Supreme Court, U.S.
FILED

No. _____ 05134 7 APR 2 0 2005

OFFICE OF THE CLERK

In The

Supreme Court of the United States

TERRY C. COLEMAN,

Petitioner,

v.

NEW ORLEANS and BATON ROUGE STEAMSHIP PILOTS' ASSOCIATION, CRESCENT RIVER PORT PILOTS ASSOCIATION, INC., and BOARD OF RIVER PORT PILOT COMMISSIONERS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM M. MCGOEY,
LSBA #14205
BARBARA RYNIKER EVANS & ASSOC.
650 Poydras Street, Suite 2045
New Orleans, LA 70130
(504) 523-8523
Attorney for Petitioner,
Terry C. Coleman

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Plaintiff, Terry C. Coleman, filed complaints alleging that he was denied entry into two river pilot apprenticeship programs because of his age (over forty). The trial court dismissed his claims on summary judgment, finding that the Age Discrimination in Employment Act is inapplicable because respondents, New Orleans and Baton Rouge Steamship Pilots' Association (hereinafter "NOBRA"), Crescent River Port Pilots Association, Inc. (hereinafter "Crescent") are not employers and the Board of River Port Pilots Commissioners (hereinafter "the Board of Commissioners") is not a joint employer. The United States Fifth Circuit Court of Appeals upheld the dismissal. The question presented here is:

I. Should the Fifth Circuit's affirmation of the lower court's findings that the NOBRA and Crescent are not employers and that the Board of Commissioners is not a joint employer under the Age Discrimination in Employment Act be allowed to stand?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED IN THIS CASE	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. THE FIFTH CIRCUIT ERRED IN GRANTING SUMMARY JUDGMENT AND DENYING COLEMAN'S MOTION FOR RECONSIDERATION BY FINDING THAT THE ADEA DOES NOT APPLY TO CRESCENT BECAUSE IT IS NOT AN "EMPLOYER"	8
II. THE FIFTH CIRCUIT ERRED IN GRANTING SUMMARY JUDGMENT AND DENYING COLEMAN'S MOTION FOR RECONSIDERATION BY FINDING THAT THE ADEA DOES NOT APPLY TO THE BOARD OF COMMISSIONERS BECAUSE IT IS NOT A "JOINT EMPLOYER"	16
III. THE FIFTH CIRCUIT ERRED IN GRANTING SUMMARY JUDGMENT AND DENYING COLEMAN'S MOTION FOR RECONSIDERATION BY FINDING THAT THE ADEA DOES NOT APPLY TO NOBRA BECAUSE IT IS NOT AN "EMPLOYER"	16
CONCLUSION	17

TABLE OF CONTENTS – Continued

Page

APPENDIX

U.S. Fifth Circuit Court of Appeals Opinion .....App. 1

Coleman v. New Orleans Baton Rouge Steamship Pilots Association Order and Reasons (Motion for Reconsideration).....App. 22

Coleman v. New Orleans Baton Rouge Steamship Pilots Association Order and Reasons (Motion for Summary Judgment).....App. 26

Coleman v. Crescent River Port Pilots Association, Inc. Order and Reasons (Motion for Reconsideration).....App. 35

Coleman v. Crescent River Port Pilots Association, Inc. Order and Reasons (Motion for Summary Judgment).....App. 39

TABLE OF AUTHORITIES

Page

CASES

Coleman v. New Orleans and Baton Rouge Steamship Pilots Association, 437 F.3d 471 (5th Cir. 2006) 1

Clackamas Gastroenterology Associates, P.C. v. Wells, 538 U.S. 440 (2003) 11

Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) 12

EEOC v. Joint Apprenticeship Committee, 80 FEP Cases 1519 (2nd Cir. 1999) 9, 10, 11

Ehret v. State of Louisiana, 862 F. Supp. 1546 (E.D. La. 1992) 15

Guy v. McDonald, 27 S.Ct. 62 (1906) 15

Kotch v. Board of River Port Pilot Com'rs for Port of New Orleans, 330 U.S. 552 (1947) 5

McKeithen v. The SS FROSFA, 441 F. Supp. 1213, (E.D. La. 1977) 15

Nationwide Mutual Insurance Company v. Darden, 503 U.S. 316 (1992) 11, 12, 14

STATUTES AND REGULATIONS

28 U.S.C. §623 ..... 1, 2, 8, 9

28 U.S.C. §630 3

28 U.S.C. §1254(1) 1

29 C.F.R. §1625.21 ..... 3, 9

PETITION FOR WRIT OF CERTIORARI

Terry C. Coleman, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Fifth Circuit entered in this matter on January 24, 2006, 2000. It is reprinted in the Appendix on page 1 (hereinafter referred to as "App. 1").

OPINIONS BELOW

The opinion of the United States Fifth Circuit Court of Appeals that gives rise to this petition is entitled *Coleman v. New Orleans and Baton Rouge Steamship Pilots Association*, 437 F.3d 471 (5th Cir. 2006). The Fifth Circuit's opinion is reprinted in the Appendix at App. 1. The trial court's opinions granting summary judgment dismissal and denial of Coleman's motions for reconsideration are reprinted in the Appendix at App. 22-41.

JURISDICTION

On January 24, 2006, the Fifth Circuit affirmed the United States District Court for the Eastern District of Louisiana's dismissal of Coleman's claims under the Age Discrimination in Employment Act (hereinafter "the ADEA"), 29 U.S.C. § 623 *et seq.*, App. 1. This petition has been filed within ninety days of the decision, Supreme Court Rule 13.1. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

U.S.C. § 623 provides in pertinent part:

(a) Employer practices

It shall be unlawful for an employer –

> (1) to fail or refuse to hire or to discharge an individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age;

(b) Employment Agency practices –

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization –

> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age; (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would

> limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age; (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

29 U.S.C. § 630 provides in pertinent part:

> (b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees . . .
>
> (1) any agent of such person, and (2) a State or political subdivision and any agency or instrumentality of a State or political subdivision of a state . . .
>
> * * *
>
> (f) The term "employee" means an individual employed by an employer . . .

29 C.F.R. § 1625.21 provides in pertinent part:

> All apprenticeship programs, including those apprenticeship programs created or maintained by joint labor-management organizations, are subject to the prohibitions of Section 4 of the Age Discrimination Employment Act of 1967, as amended, 29 U.S.C. § 623(a).

STATEMENT OF THE CASE

Petitioner, Terry Coleman (hereinafter "Coleman"), is an African-American, who was born on October 6, 1951. He graduated from Clark University in 1974 with a Business Administration degree and subsequently earned 38

hours towards an M.B.A. He worked in several industries. In 1990, he began working in the maritime industry and has been captaining boats on the Mississippi since 1994. Coleman was forty-seven years old in 1999 when respondent, Crescent River Port Pilots Association, Inc. (hereinafter "Crescent") denied him entrance into its apprenticeship program. He was forty-nine years old when respondent, New Orleans and Baton Rouge Steamship Pilots Association (hereinafter "NOBRA"), denied him entrance into their apprenticeship program. Entrance into one of the programs leads to employment as a Crescent or NOBRA river pilot at an annual salary of more than three hundred thousand dollars. Until recently, there were no African-American river pilots employed by any of the pilot associations in Louisiana. Thus, when Coleman was a young adult there was no opportunity for him to become a river pilot.

Louisiana's legislature has created several river pilot associations, with each one having a monopoly on a certain segment of the Mississippi River. Any foreign ship traveling on the Mississippi River through Louisiana must hire a pilot from one of these associations to navigate the vessel through that association's stretch of the Mississippi River. Thus, a foreign ship traveling through Crescent's portion of the River must hire a Crescent pilot to navigate and once the ship is traveling through NOBRA's portion of the river, the ship must hire a NOBRA pilot to navigate.

In order to become a Crescent pilot, an applicant applies to the Board of River Port Pilots Commissioners (hereinafter the "Board of Commissioners"), which consists of three Crescent members, selected by the Crescent membership. The Board of Commissioners sends to Crescent a list of all applicants who meet Crescent's qualifications. One

qualification is a candidate must be younger than forty years old. The Crescent membership then votes on the qualified applicants and selects who is "elected" into the apprenticeship program. The winners are then entered into the one year apprentice program operated by the Board of Commissioners and Crescent.

Once a candidate completes the apprenticeship program, the Board presents the pilot to the Louisiana governor who signs his commission. The pilot buys Crescent stock and becomes a "member." Crescent then schedules the pilot to pilot ships through Crescent's arrangements with the shipping companies. The pilot is paid by Crescent based on how many shifts he has taken per month. If the pilot breaches either Crescent or the Board of Commissioner's rules, he is subject to discipline from both. If a pilot commits a serious infraction, the Board can institute hearings and recommend decommissioning by the governor, who usually concurs.

The process for becoming a NOBRA pilot is identical except that the NOBRA commissioners are called the Board of Examiners and the NOBRA rules require that candidates be under forty-five years old.

When Coleman was a young man, there were no African-American pilots in any of the associations. Dating back to 1805, Louisiana pilot associations routinely only "elected" family members and friends into the apprenticeship programs. See *Kotch v. Board of River Port Pilot Com'rs for Port of New Orleans,* 330 U.S. 552, 560 (1947). Once Coleman learned that there was only one African-American pilot, Kelvin Boston, among the monopoly pilot organizations in the State of Louisiana, his interest in

becoming a pilot intensified. By the time Coleman started attempting to ride with pilots, he was already over forty but under forty-five years of age.

Kelvin Boston, a NOBRA pilot, allowed Coleman to ride with him on the NOBRA segment of the Mississippi River so that Coleman could take the test to obtain the first class Coast Guard license he needed to qualify as a candidate for the NOBRA apprenticeship program. NOBRA's president, Joe Clayton, told Coleman that he would be an asset to NOBRA, except for his age. Coleman completed the necessary rides and passed the test to obtain the First Class License for the NOBRA stretch of the river in February of 1996, however NOBRA had just completed an election class in late 1995. Coleman applied for the second apprentice class of the 1995 election but Clayton informed him that he was too late.

Coleman also sought to become a pilot with Crescent as he learned that NOBRA and Crescent had entered into an agreement with the Black Caucus of the Louisiana legislature that they would recruit minority pilots. Crescent's President, Captain Mark Delesdernier, told Coleman that if he filed an injunction to stop the NOBRA election, that "we could file a suit against you for millions of dollars." Undeterred, Coleman began attempting to obtain rides on the Crescent stretch of the River so that he could obtain the Coast Guard license required to be placed on the ballot for election into the Crescent apprenticeship program. However, no Crescent pilots would allow him to ride with them because of his age. Coleman even attempted to ask Crescent pilots for rides after one of the Crescent meetings and Coleman was warned that he should leave because the pilots wanted to "break his legs." Upon learning in 1999 that Crescent would be having an

election, Coleman submitted an application. Coleman's name was not submitted on the ballot due to his age.

Coleman learned that NOBRA was going to have an election in 2001. Clayton told Coleman that he still had the age problem. Coleman asked if NOBRA had any new requirements and Clayton informed him that he needed a bridge resource management course. Coleman asked where he could take the course and Clayton said that it was offered in Florida; however, Coleman discovered that it was offered in nearby Morgan City, Louisiana. Coleman passed the course prior to the election; however, Coleman was not placed on the apprenticeship ballot.

Coleman was treated quite differently than the younger candidates. NOBRA and the Board of Examiners, which consists of NOBRA members, routinely pre-select the applicants to be elected into the apprentice program. In both 1995 and 2001, a list was circulated telling pilots which candidates should be elected. In 2001, several of the young, pre-selected applicants did not even have applications on file with the Board and were given preferential treatment. For example, NOBRA member Louis Wattigny was informed that the election would be delayed so that young, L.M. Wattigny, III, could obtain the requisite Coast Guard license. NOBRA Vice-President, Marvin Bowman, created a list of deficiencies of the young pre-selected applicants, and gave it to the President of the Board, Martin Gould, to correct the deficiencies. He even arranged special ship simulator and bridge resource management courses for the young applicants. Of course, all of the winners of the election were under forty-five years of age.

Coleman filed an EEOC charge against Crescent and the Board of Commissioners and a separate charge against NOBRA based on age discrimination. The EEOC issued a cause determination of age discrimination in Coleman's favor in both cases. Coleman filed a suit against Crescent and the Board of Commissioners and a separate suit against NOBRA based on age discrimination. Both cases were set before the same trial judge. The trial court dismissed both cases on summary judgment, finding that the ADEA was inapplicable because Crescent and NOBRA were not employers and that the Board of Commissioners was not a joint employer. App. 22-41. The Fifth Circuit affirmed the dismissal, App. 1.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT ERRED IN GRANTING SUMMARY JUDGMENT AND DENYING COLEMAN'S MOTION FOR RECONSIDERATION BY ERRONEOUSLY FINDING THAT THE ADEA DOES NOT APPLY TO CRESCENT BECAUSE IT IS NOT AN "EMPLOYER."

The Fifth Circuit erred in finding that the ADEA's prohibition against age discrimination is inapplicable to respondent, Crescent because it is not an "employer." The ADEA is clearly applicable to Crescent. The Age Discrimination in Employment Act (ADEA) 29 U.S.C. § 623 provides that it "is unlawful for an employer to fail or refuse to hire or to discharge an individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ". Likewise "it is unlawful for an employment agency to fail or refuse to

refer for employment, or otherwise discriminate against, any individual because of such individual's age, or to *classify or refer for employment any individual on the* basis of such individual's age." Id. Labor organizations, such as unions, are prohibited from discriminating based on age as well. The ADEA provides that it is unlawful for a labor organization:

> to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age; (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age; (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

29 U.S.C. § 623(c).

Additionally, 29 C.F.R. § 1625.21 provides in pertinent part, "**All apprenticeship programs**, including those apprenticeship programs created or maintained by joint labor-management organizations, are subject to the prohibitions of Section IV of the Age Discrimination Employment Act of 1967, as amended, 29 U.S.C. § 623." 29 C.F.R. § 1625.21. Here, the EEOC specifically-referred to defendant's violation of 29 C.F.R. § 1625.21 in finding that cause exists to believe that plaintiff was discriminated against because of his age.

The EEOC explained:

> [T]he EEOC Compliance Manual provides in pertinent part that "a[n] applicant to, or a participant in, training or apprenticeship program is protected against discrimination with respect to admission to, or participation in, the training or apprenticeship program, regardless of whether the individual is an 'employee.' **Discrimination against a participant in an apprenticeship or training program that is required prior to employment, or that commonly leads to regular employment, also constitutes discrimination against an applicant for employment, and is prohibited** because it has the effect of discriminatorily denying someone an employment opportunity. [emphasis added]

Coleman was denied admission into the apprenticeship program operated by Crescent and the Board of Commissioners based on his age. The courts have allowed plaintiffs in similar circumstances to proceed against operators of apprenticeship programs for age discrimination. In *EEOC v. Joint Apprenticeship Committee*, 80 FEP Cases 1519, (2nd Cir. 1999), the plaintiff was denied entrance into a four-year electrician apprentice program because the program required apprentices to be between the ages of 19 and 22. The program was operated by the Joint Apprenticeship Committee, a committee of the Joint Industry Board of the Electrical Industry. Successful completion of the apprenticeship program entitled an individual to membership in the International Brotherhood of Electrical Workers, Local 3, a union. The Joint Apprenticeship Committee was not an employer, yet the ADEA was held to bar discrimination by the Joint Apprenticeship Committee based on age.

The Fifth Circuit here refused to follow *Joint Apprenticeship Committee*. Crescent and the Board of Commissioners have a relationship similar to the relationship of the local union and the JAC in the *Joint Apprenticeship Committee* case. In *Joint Apprenticeship Committee*, the only way for an individual to become an electrician was to go through the local union and the Joint Apprenticeship Committee. Here, the only way to work as a river pilot on Crescent, Inc.'s portion of the river is to go through the Crescent and the Board of Commissioners' apprenticeship program. Thus, Crescent can be sued under the ADEA just as the Joint Apprenticeship Committee was properly sued under the ADEA.

In the present case, the trial court erroneously found that Crescent is not an employer based on *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003). However, the Fifth Circuit focused incorrectly on the *Clackamas* standard for determining whether an officer or a shareholder is an employee and should have applied the common law test adopted and summarized by this Court in *Nationwide Mutual Insurance Company, v. Darden*, 503 U.S. 316 (1992). The *Darden* Court held:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are: the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method

> of payment; the hiring party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is a business; the provision of employee benefits; and the tax treatment of the hired party. *Id.*, quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989).

A consideration of the *Darden* factors clearly shows that Crescent is an employer under the ADEA. Crescent controls the hiring/election process as was recognized by one of the Fifth Circuit panel members during oral argument. A pilot cannot work on the Crescent stretch of the river unless he is a Crescent pilot. Crescent also has significant control over the pilot's work. Crescent has the right to discipline and ultimately expel, i.e., terminate members. If Crescent expels a pilot from the association, he cannot work as a pilot on the Crescent stretch of the river. Crescent's work rules are forty-seven pages long and contain scores of regulations regarding, scheduling shifts, pilot conduct, pilot pay, sick leave, discipline, fines and hundreds of details relating to how pilots do their jobs. The very first rule states that Crescent's

> Board of Directors shall have supervision over the conduct of the members of the Association. Whenever a member shall be found guilty of conduct unbecoming a pilot or shall do any act or thing which tends to bring discredit upon the Association, the Crescent Board of Directors shall have the power to try such offending pilot. . . .

The Crescent Board of Directors is empowered to investigate refusals of service by pilots. Section 9 of Rule 1 imposes a fine of $1000 a day for any pilot who unilaterally resigns, and thereafter refuses duty. Section 21 of

Rule 1 requires pilots to dress neatly, and requires that "hair should be neat and not below the collar. . . . Shoes and socks must be worn and should be clean, no thongs or sandals." The rules include more than 20 pages of regulations regarding scheduling, boarding ships, exiting ships, rest periods, shift rotation, etc. Rule 17 creates a "Captain of the Station", who "shall be responsible for the discipline and conduct of the pilots while on the station." If a pilot desires to go off duty, he is required to "notify **management** at least six hours in advance . . . " and can be recalled to duty at "any time the Board [of Directors of Crescent] deems it necessary." Clearly, Crescent exercises significant control over the pilots.

Additionally, the majority of the other common law factors support the conclusion that Crescent is an employer. The skill required to be a pilot does not require a finding that pilots are independent contractors. A river pilot's training involves riding on the river with another pilot and a one-year apprenticeship program that relies heavily on on-the-job type training. While it is true that no one supervises the pilots when they are at the helm, the occupation of piloting a ship is often performed by employees. Coleman himself is presently employed as an employee as a captain of a vessel. However, even if piloting is considered a skilled occupation, this fact does not contribute much to the analysis of whether the pilots are employees or independent contractors. Airline pilots, engineers, trial attorneys, and even doctors work as employees.

As to the source of instrumentalities and tools used, Crescent dictates which ship plaintiff is assigned to work. Also Crescent provides the dispatcher office used to dispatch the pilots to their assignments and the boats which transport the pilots to the ships. The location of the

work is clearly dictated by Crescent as it decides which boats the pilots will pilot.

The factor involving the duration of the relationship also points to employee status. Crescent pilots can only work for Crescent. As to whether Crescent can assign additional projects and can determine when and how long a pilot works, Crescent has control over the pilots' entire work schedule, can assign additional assignments and can determine when and how long the pilots work.

The factors involving whether the work is a regular part of the business of Crescent and whether Crescent is a business also points to employer/employee status. Supplying pilots to vessels is Crescent's only business. Further Crescent operates as a corporation. As to how the pilots are paid, the pilots are neither paid by the job or by time, thus this factor is inapplicable. However, Crescent does provide employee-type benefits, such as health insurance, vacation, sick leave and retirement benefits.

The last factor mentioned in *Darden* is the tax treatment of the hired party. Crescent issues a form 1099 to its pilots and does not do employee withholding. However, the fact that an employer does not perform withholding cannot insulate an employer from the anti-discrimination provisions of the ADEA and Title VII.

The most significant *Darden* factors mitigate in favor of finding that Crescent is the employer of the pilots. This is especially true where Crescent selects the pilots, disciplines the pilots and can refer them to the Board of Crescent Commissioners for decommissioning, thereby **preventing a pilot from ever working as a commissioned pilot on the Crescent stretch of the river**. Crescent should not be allowed to discriminate based on age by cloaking itself with

the appearance of being a non-profit association of independent contractors, especially given the fact that Crescent enjoys state-created monopoly status. Older workers, African-Americans and women cannot work as a river pilot on Crescent's stretch of the River unless they work for Crescent. If the Fifth Circuit's opinion is affirmed, there is no federally guaranteed right to equal opportunity for river pilots in Louisiana.

The Fifth Circuit and the trial court were erroneously impressed by the fact that once a pilot takes the helm of a vessel, neither Crescent, Inc. nor the Board, can exert control over the pilot. *Ehret v. State of Louisiana*, 862 F. Supp. 1546, 1550 citing, *McKeithen v. The SS FROSFA*, 441 F. Supp. 1213, 1220 (E.D. La. 1977). The courts' reliance on this factor is misplaced. The *McKeithen* case relied on *Guy v. Donald*, 27 S. Ct. 62, 64-65 (1906), wherein this Court refused to hold a Virginia pilot association vicariously liable for the negligence of a pilot in a shipping accident. The Court refused to find vicarious liability because it found that, under a Virginia statute, the pilot was the agent of the vessel's owner. Additionally, the Court relied on the fact that under general maritime law, the captain was the master of the ship and the association could not control the pilot once he was at the helm, *Guy*, 27 S. Ct. at 64-65. However, this principle was adopted so that a captain can make quick judgments in order to ensure the safety of the ship and has no relevance in determining whether Crescent is an employer in the context of discrimination law.

Crescent seeks to escape the United States' discrimination laws by claiming that the pilots are independent contractors hired by the shipping companies. However, the shipping companies contract with and pay Crescent for

pilots. Crescent assigns the pilots to the various ships without the shipping companies even knowing which pilot they are being assigned. How many independent contractors belong to an "association" that schedules their work, determines how much they are paid and have no freedom to work with another group? Clearly, the pilots are employees of Crescent, Inc., a state-created monopoly that employs pilots.

II. THE FIFTH CIRCUIT ERRED IN GRANTING SUMMARY JUDGMENT AND DENYING COLEMAN'S MOTION FOR RECONSIDERATION BY ERRONEOUSLY FINDING THAT THE BOARD OF COMMISSIONERS COULD NOT BE LIABLE AS A "JOINT EMPLOYER."

The Fifth Circuit held that the Board of Commissioners could not be held liable as a joint employer because it held that Crescent itself is not an employer. Once this Court reverses the Fifth Circuit's determination of Crescent's status, the case should also be remanded to determine whether the Board of Commissioners is a joint employer.

III. THE FIFTH CIRCUIT ERRED IN GRANTING SUMMARY JUDGMENT AND DENYING COLEMAN'S MOTION FOR RECONSIDERATION BY ERRONEOUSLY FINDING THAT THE ADEA DOES NOT APPLY TO NOBRA BECAUSE IT IS NOT AN "EMPLOYER."

The Fifth Circuit's opinion as to NOBRA is incorrect for the same reasons argued above relating to Crescent. Like Crescent, NOBRA has work rules, albeit shorter, which include fines and disciplinary rules similar to

Crescent's work rules. NOBRA "elects" pilots into the apprenticeship program which leads to their ultimate commissioning and hiring, provides for sick leave, retirement benefits and has the power to recommend a NOBRA pilot for decommissioning. In short, NOBRA is an employer, just as Crescent is.

CONCLUSION

This Court should grant certiorari and remand for trial on the merits. Otherwise, Coleman and others will be deprived of equal opportunity on the Mississippi River.

Respectfully submitted,

WILLIAM M. MCGOEY,
LSBA #14205
BARBARA RYNIKER EVANS & ASSOC.
650 Poydras Street, Suite 2045
New Orleans, Louisiana 70130
(504) 528-9279 – FAX: (504) 528-9219

437 F.3d 471

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-30666

TERRY C. COLEMAN,

Plaintiff-Appellant,

versus

NEW ORLEANS AND BATON ROUGE STEAMSHIP PILOTS' ASSOCIATION,

Defendant-Appellee.

No. 04-30700

TERRY C. COLEMAN,

Plaintiff-Appellant,

versus

CRESCENT RIVER PORT PILOTS ASSOCIATION, INC.,

Defendant-Appellee.

TERRY C. COLEMAN,

Plaintiff-Appellant,

versus

BOARD OF RIVER PORT PILOTS COMMISSIONERS,

Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Louisiana

(Filed Jan. 24, 2006)

Before JONES, Chief Judge, JOLLY and DeMOSS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

In this age discrimination case, the question is whether the Mississippi River pilot associations are "employers" of the member pilots for the purposes of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* The question is difficult and yields no straightforward answer. The defendant associations are long-standing, peculiarly conducted institutions recognized by statute, owned and governed by their member pilots, and serving as a sort of clearinghouse and dispatching service for the river pilots. There is no doubt that if the plaintiff suffered age discrimination, it was administered by the hands of the defendant associations because of their age-restrictive policies. Yet, there is an absence of any traditional employer relationship, traditional independent-contractor relationship, hiring-hall relationship, or employment-agency relationship between the associations and the pilots.

Terry Coleman ("Coleman"), born October 1, 1951, brought suit against the New Orleans & Baton Rouge Steamship Pilots Association ("NOBRA") and the Crescent River Port Pilot's Association ("Crescent"), as well as the Board of River Port Pilot Commissioners (the "Crescent Board"), alleging that these entities unlawfully discriminated against him on the basis of his age in violation of the ADEA. They did so, he claims, by refusing to elect him

into their respective pilot apprenticeship programs because he was too old under their membership qualifications. The District Court granted summary judgment in these separately filed actions to NOBRA, Crescent, and the Crescent Board, holding that these entities are not "employers" within the meaning of the ADEA and therefore cannot be held liable under the ADEA. Because both cases present similar legal issues, we consider them together in this opinion.

We hold that NOBRA, Crescent, and the Crescent Board are not "employers" of river pilots within the meaning of the ADEA. These entities are therefore not subject to the ADEA's prohibitions on age discrimination in employment. Accordingly, we AFFIRM the District Court's grants of summary judgment to NOBRA, Crescent, and the Crescent Board.

I

In our effort to determine whether any of the defendants meet the definition of "employer" under the ADEA, we must first understand Louisiana's body of rules and regulations governing the licensing of Mississippi River pilots and the relationship among pilots, boards of examiners, and pilots' associations in the operation of the pilot apprenticeship programs. Only then can we fully understand the organizational structure of the defendant pilots' associations and its bearing on the question of liability under the ADEA.

A

Louisiana state law requires that local pilots guide foreign ships along Louisiana waterways, including the

Mississippi River. The Louisiana portion of the Mississippi River is divided into three zones. *See generally Hendrix v. Louisiana Public Service Commission*, 263 So.2d 343, 345 (1972). "Bar pilots" or "associated branch pilots" guide vessels in and out of the entrance of the Mississippi River between Pilottown and the Gulf of Mexico.[1] LA. REV. STAT. § 34:941, *et seq.* "River port pilots" guide vessels between Pilottown and New Orleans. LA. REV. STAT. § 34:991, *et seq.* "New Orleans and Baton Rouge Steamship Pilots" guide seagoing vessels from the port of New Orleans to the port of Baton Rouge and intermediate ports. LA. REV. STAT. § 34:1041, *et seq.* An individual who wishes to serve as a pilot in any of these zones must receive a commission from the Governor of Louisiana entitling him to work as a pilot on a particular stretch of the river. Receiving a commission is a multi-step process.

Regulation of the process of applying to be a pilot is mainly the responsibility of the state regulatory boards created for this specific purpose. The Board of River Port Pilot Commissioners ("Crescent Board") is authorized by statute to "hold examinations under such rules and regulations, and with such requirements as they shall have provided," to certify to the Governor that applicants are qualified to be river port pilots. LA. REV. STAT. § 34:991, 993. The Board of Examiners for the New Orleans and Baton Rouge Steamship Pilots ("NOBRA Board") is similarly authorized to certify qualified applicants to the Governor to be New Orleans and Baton Rouge Steamship Pilots. LA. REV. STAT. § 34:1042, 1045. Each of these boards is comprised of three citizens holding commissions

[1] Bar pilots and their association are not at issue in this case.

for the appropriate stretch of the river. LA. REV. STAT. § 34:991, 1042. The Governor appoints individuals to serve on the commissions. *Id.*

An individual must first petition the appropriate board for a determination of his qualifications.[2] A few specific requirements for qualified pilots are set out by statute. Before the Crescent Board may certify the candidate to the Governor for commissioning, river port pilots are required to (1) be of good moral character, (2) be a voter of the state of Louisiana, and (3) have completed an approved apprenticeship program. LA. REV. STAT. § 34:993. New Orleans and Baton Rouge Steamship Pilots are required by statute to (1) be of good moral character, (2) be a voter of the state of Louisiana, (3) have a first class pilot license issued by the United States Coast Guard, and (4) complete a six-month apprenticeship. LA. REV. STAT. § 34:1045.

The Crescent Board and the NOBRA Board are authorized by statute to provide additional requirements for individuals seeking to become pilots. Among myriad licensing and educational requirements, the Crescent Board requires that the individual "must not have reached his *fortieth birthday* prior to the first day of balloting on apprentices by the river port pilots." LA. ADMIN. CODE tit. 46 § 3201(C) (2003) (emphasis added). The NOBRA Board requires that the individual "shall not have reached his or her *forty-fifth birthday* before being commissioned." LA. ADMIN. CODE tit. 46, § 6107 (2003) (emphasis added).

---

[2] This exact process does not appear to be mandated by statute, but rather the result of the regulations promulgated by the boards of commissioners/examiners and the respective pilots' association for the particular stretch of the river.

An individual applying to be an apprentice first submits his application to the appropriate board of commissioners/examiners for certification that the individual is a qualified apprentice candidate. Because apprenticeships must be completed under the supervision of a commissioned pilot, and because only a limited number of pilots are allowed by law, certification by the board as a qualified candidate does not guarantee an individual a place in the apprenticeship program. The individual must then be elected to apprenticeship by a majority vote of the pilots' association for the respective stretch of the river.

Once elected, the candidate completes a board-certified apprenticeship program under the supervision of commissioned pilots. The boards retain the right to require satisfactory completion of the apprenticeship program, extend the apprenticeship, or terminate the apprenticeship when deemed necessary. LA. ADMIN. CODE tit. 46, § 6107(L) (2003). Upon completion of the apprenticeship program, the boards examine the apprentices as to their knowledge of pilotage and their proficiency and capability to serve as commissioned pilots. LA. ADMIN. CODE tit. 46, § 6107(M)(2) (2003). If the board deems the apprentice qualified, the board certifies the apprentice to the Governor for commissioning. The Governor may then appoint, in his discretion, the individual to an existing vacancy. LA. REV. STAT. §§ 34:993, 1045.

B

The pilots' associations that elect individuals to apprenticeships exist pursuant to Louisiana law giving pilots the right to "form themselves into an association or associations as to them may seem fit, not in conflict with

law. . . ." LA. REV. STAT. § 34:995; LA. REV. STAT. § 1047. Crescent and NOBRA periodically hold elections for apprenticeship when each respectively determines that a need exists for new pilots. The associations select only the number of apprenticeship candidates commensurate with the number of new pilots needed.[3]

Crescent and NOBRA are incorporated under the laws of Louisiana as non-profit corporations. LA. REV. STAT. § 12:201 *et seq.* Crescent's Charter provides that the objects and purposes of the corporation are, in relevant part:

> To provide efficient means for dispatching Crescent River Port Pilots to ships and vessels assigned and requiring the services of such pilots on an equitable basis, providing for the collection and disbursement of fees and charges of whatsoever nature and kind incident to the performance of such services, and making distribution thereof among the shareholders of this corporation after

[3] The NOBRA Board's regulations provide that an applicant "must have been duly elected an apprentice in the New Orleans and Baton Rouge Steamship Pilots Association as per Association rules in effect as of such application." LA. ADMIN. CODE tit. 46, § 6107 (2003). The legal source of this voting process for the Crescent Board and Crescent is unclear. We have found nothing in the law requiring only so many individuals be apprenticed as there are open seats, although this does make practical sense. Similarly, we have found nothing in the law requiring that the association elect apprentices by majority vote, although the fact that, as a practical matter, all pilots are association members makes this process sensible and efficient. What is clear, however, is that this process is long-standing and a matter of tradition for the pilots. *See generally Kotch v. Board of River Port Pilot Com'rs for Port of New Orleans*, 25 So.2d 527, 755-58 (1946), *aff'd* 330 U.S. 552 (1947).

> deducting all legitimate and approved expenses of the operation of same.
>
> To provide for a pension and welfare plan for retired shareholders of this corporation, and for their families.
>
> * * *
>
> To inculcate, secure and maintain skill, discipline, merit and efficiency in the pilots engaged in piloting vessels over the pilotage waters assigned to the Crescent River Port Pilots, promoting and assisting the commerce and prosperity of the Port of New Orleans.

NOBRA's Charter similarly provides, albeit with much less specificity, that the purpose of the association is

> To carry on the business of piloting sea-going and other vessels on the Mississippi River, between the Mississippi River Ports of New Orleans and Baton Rouge and return, for fees, and to shift vessels in the harbors of Harahan, Avondale, St. Rose, Destrehan, Good Hope, Norco, Reserve, Burnside, Gramercy and other harbors to and including Baton Rouge, Louisiana, in accordance with Act 291 of the Legislature of 1942 of the State of Louisiana (Louisiana Revised Statutes 34:1041, et sequitur); and to inculcate, secure and maintain skill, discipline, merit and efficiency in the pilots engaged in this business, and to thereby promote and assist the commerce and prosperity of said ports and intermediate ports.

Each association is owned by its members; each member pilot holds one share of the association's stock.

The primary business of both associations is to receive requests for pilotage from ship agents and dispatch pilots

to those vessels. The associations also collect the fees from the shipping companies for the pilotage work performed. The receipts, minus general overhead expenses, are remitted monthly to member pilots in accordance with an established formula based on the number of days each individual was available for piloting. The associations do not withhold tax or FICA on the monies distributed to pilot members, and pilots' pay is reflected on IRS Form 1099, rather than IRS Form W-2.

Membership in an association is not required by law, but most, if not all, pilots currently commissioned in the NOBRA and Crescent stretches of the river are members of the appropriate association.

II

A

Despite the complexity of the interrelationships and the working arrangements among the associations and the pilots, the facts underlying Coleman's claims are simple. Coleman, born on October 6, 1951, is an experienced ship captain who sought to become a commissioned pilot on the NOBRA and Crescent stretches of the Mississippi River.

Coleman submitted an application for the apprenticeship program to the NOBRA Board in 1996. NOBRA held an election for apprentices in 2001, but Coleman's name did not appear on the ballot as a certified candidate for apprenticeship. At the time of the NOBRA election, Coleman was forty-nine years old. NOBRA requires that an applicant "not [have] reached his forty-fifth (45th) birth date."

Coleman also submitted an application for the apprenticeship program to the Crescent Board in 1999. Crescent held an election that same year, but Coleman's name did not appear on the ballot as a certified candidate for apprenticeship. At the time of the Crescent election, Coleman was forty-seven years old.[4] Crescent's Charter requires that an applicant "shall not have reached his fortieth birthday prior to the day of the first ballot for his election as an apprentice."

B

After filing an EEOC charge against NOBRA and receiving a right-to-sue letter, Coleman filed an action against NOBRA alleging that the association unlawfully discriminated against him on the basis of his age in violation of the ADEA by failing to elect him into the river pilot apprenticeship program. NOBRA moved for summary judgment asserting that it is not an "employer" under the ADEA. The District Court granted NOBRA summary judgment, finding that Coleman did not present a genuine issue of material fact with respect to whether NOBRA is an "employer" of river pilots within the meaning of the ADEA. *Coleman v. New Orleans Baton Rouge Steamship Pilots Association*, 2004 WL 1237447 (E.D. La. June 1, 2004). The District Court summarily adopted the reasoning

[4] Additional facts are alleged by Coleman and the defendants. These facts, however, are not relevant to the question whether these entities are "employers", but rather are relevant only to the establishment of a *prima facie* case of age discrimination and the subsequent *McDonnell Douglas* analysis. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Machinchick v. PB Power, Inc.*, 398 F.3d 345, 349-53 (5th Cir. 2005). The District Court did not address whether Coleman established a *prima facie* case of age discrimination.

of *Ehret v. State of Louisiana*, 862 F.Supp. 1546 (E.D. La. 1992), a case holding that Crescent lacked control over its member pilots and therefore was not their employer. *Ehret*, in turn, had found persuasive the analysis in the tort case *McKeithen v. The SS FROSTA*, 441 F.Supp. 1213 (E.D.La.1977), which held that NOBRA was not vicariously liable as an employer because it exerted no control over a pilot once he took the helm of a vessel. *McKeithen* likened NOBRA to other professional associations and found NOBRA pilots to be independent contractors.

Coleman also received right-to-sue letters from the EEOC for his charges against Crescent and the Crescent Board. Coleman then filed separate actions alleging violations of the ADEA against Crescent and the Crescent Board, which were consolidated before the District Court. Crescent and the Crescent Board both moved for summary judgment arguing in part that they are not "employers" or "joint employers." Relying on the same reasoning as the opinion in the NOBRA proceeding, the District Court granted Crescent and the Crescent Board summary judgment. *Coleman v. Crescent River Port Pilot's Association, Inc.*, 2004 WL 1278005 (E.D. La. June 8, 2004).

Coleman now appeals both judgments.[5] Thus, we have before us the two appeals presenting mutually dispositive issues.

---

[5] Coleman also appeals the District Court's denial of his motions for reconsideration of the summary judgment motions, or in the alternative new trial. We do not discuss these issues on appeal because Coleman's argument is underdeveloped, simply arguing that his motions should have been granted to correct the manifest injustice of the District Court's error in granting summary judgment to defendants.

III

We review a grant of summary judgment *de novo,* using the same standard applied by the District Court. *Hall v. Gillman, Inc.*, 81 F.3d 35, 36 (5th Cir. 1996). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

A

(1)

A primary purpose of the ADEA is to prohibit arbitrary age discrimination in employment. 29 U.S.C. § 621(b). To accomplish this purpose, the ADEA prohibits certain practices by employers, employment agencies, and labor organizations. 29 U.S.C. § 623(a)-(c). In relevant part, the ADEA makes it unlawful for an employer

> to otherwise fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age.

29 U.S.C. § 623(a)(1). An employment agency may not

> fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

29 U.S.C. § 623(b). Finally, it is unlawful for a labor organization

> (1) to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his age;
>
> (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

29 U.S.C. § 623(c). Although the prohibitions of the ADEA are broad in scope, the reach of the ADEA is limited by the statute's own definitions of "employer," "employment agency," and "labor organization." *See* 29 U.S.C. § 630. If an entity is not an employer, employment agency, or labor organization, it is not subject to the prohibitions of the ADEA against age discrimination in employment.

The question that confronts us is whether Crescent[6] and NOBRA are entities that are subject to the prohibitions of the ADEA. The answer to this question is not

---

[6] Coleman does not assert that the Crescent Board is an employer standing alone, but rather that the Crescent Board is only subject to the ADEA as a joint employer with Crescent.

immediately apparent. We begin by considering each possibility of coverage under the ADEA.

(2)

We first observe that NOBRA and Crescent cannot be considered "employment agencies" or "labor organizations" under the ADEA. Coleman has not made such an assertion, but at first glance, NOBRA and Crescent share characteristics with employment agencies and labor organizations as they are commonly understood. The dispatching function of the associations, matching pilots with vessels needing piloting, may be analogized in a general way to the usual purpose of an employment agency or union hiring hall. However, we must deal specifically with the definitions in the ADEA. NOBRA and Crescent are not labor organizations because they do not exist for the "purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment. . . ." 29 U.S.C. § 630(d). Although the ADEA refers to hiring halls, its reference is only to explain that a labor organization is "deemed to be in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer. . . ." 29 U.S.C. § 630(e).

Moreover, labor organizations interact with the *employer* of the members of the organization. A shipowner or charterer is not the hired pilot's employer in the sense relevant here, for it exercises no control over the pilot's navigation of the vessel. We can find no argument or authority for deeming pilots anything other than independent

contractors of the vessels they are hired to navigate. Thus, this term "employer" prevents our finding that NOBRA and Crescent are employment agencies, which are defined as "any person regularly undertaking with or without compensation to procure employees for an *employer* and includes an agent of such person. . . ." 29 U.S.C. § 630(c) (emphasis added).

Despite the functional similarities between the associations and labor organizations/employment agencies, because of the ADEA definitions of the two types of entities, we are left to consider only whether NOBRA and Crescent are *employers* of their member pilots. The ADEA defines an "employer" as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . ." 29 U.S.C. § 630(b). This definition, however, provides little guidance in determining whether a particular entity is in fact an employer; the statute simply defines "employee" as "an individual employed by any employer. . . ." 29 U.S.C. § 630(f).[7]

The circular language defining "employer" at least states clearly that an entity must employ twenty or more employees to satisfy the ADEA definition of employer. Whether Crescent or NOBRA has more than twenty employees depends entirely on whether the pilots are

---

[7] The terms "employer" and "employee" have been identically treated under the ADEA and Title VII. Thus, cases interpreting the terms under either statute may be considered in determining whether the defendants are employers for the purposes of the ADEA. *See Fields v. Hallsville Indep. School Dist.*, 906 F.2d 1017, 1020 n.7 (5th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991).

considered to be employees of the associations. We are thus left with the sole question whether the pilots are the associations' employees, a term not substantively defined by the statute.[8]

(3)

We have come all this way to arrive at the point suggested by the previous cases and indeed by the District Court: the touchstone of our analysis centers around the

---

[8] As noted above, the District Court relied on *Ehret*'s multi-factor right-to-control analysis to hold that the pilots are not employees of the associations. Coleman asserts that *Ehret* is no longer controlling law because the post-*Ehret* promulgation of 29 C.F.R. § 1625.21 clarified that NOBRA and Crescent are employers at least with respect to the apprenticeship program. Coleman notes that the EEOC specifically referred to 29 C.F.R. § 1625.21 in finding that cause existed to believe that Coleman was discriminated against because of his age. Coleman also notes that courts have allowed plaintiffs to proceed against operators of similar apprenticeship programs for violations of the ADEA. *See EEOC v. Joint Apprenticeship Committee,* 186 F.3d 110 (2d Cir. 1999).

We think Coleman misreads the scope of 29 C.F.R. § 1625.21. We agree with the District Court that the regulation "expands the coverage of the ADEA to applicants for apprenticeship programs, but does not expand the classes of persons liable pursuant to the ADEA as set forth in 29 U.S.C. § 623." *Coleman v. New Orleans Baton Rouge Steamship Pilots Ass'n,* 2004 WL 1237447, at *3 (E.D. La. June 1, 2004). Section 1625.21 did not alter 29 C.F.R. § 1625.1, which provides that "the terms person, employer, employment agency, labor organization, and employee shall have the meanings set forth in § 11 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621 *et seq.* . . ." The regulation itself makes clear that it does not expand liability beyond "employers" by specifically referencing the "prohibitions of Section IV of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 623." The Second Circuit's decision in *Joint Apprenticeship Committee* is not to the contrary because it simply assumed that an employer-employee relationship existed. 186 F.3d at 115.

common-law notion of control of the individual. Our approach to the question of control takes a somewhat different path, however. In *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003), the Supreme Court approved the EEOC's gloss on the control standard in questioning whether a partner, officer, major shareholder, or director qualifies as an employee. Given the relationship between the pilots and the associations, which we have earlier described in detail, we find such an analysis specifically appropriate. The EEOC framed the issue as "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control." *Id.* at 448 (internal citation omitted). The Court specifically embraced the EEOC's proposed six factors relevant to determining whether a shareholder/director is an employee of the organization:

(1) Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work

(2) Whether, and if so, to what extent the organization supervises the individual's work

(3) Whether the individual reports to someone higher in the organization

(4) Whether, and if so, to what extent the individual is able to influence the organization

(5) Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts

(6) Whether the individual shares in the profits, losses, and liabilities of the organization.

Id. at 449-50. We now apply these Supreme Court/EEOC factors to the pilots' relationship to the defendant associations.

The first factor we consider is whether the pilots' associations hire and fire the member pilots. Despite Coleman's arguments to the contrary, they do not. Certainly, the pilots' associations do have the power to elect apprentices and to admit pilots into their membership. The associations, however, do not have the power to grant commissions that permit the pilot to work in the profession; pilots receive their commissions from the Governor, and the associations cannot decommission a pilot. With respect to the actual job performed – piloting – the role of the associations is essentially that of dispatching pilots to the ships needing them; the vessel engages the pilot and the master of the vessel can refuse the services of a particular pilot. This first factor weighs against labeling the pilots ADEA employees.

The second and third factors ask whether the pilots' associations supervise the individual pilot's work and whether the pilot reports to someone "higher" in the association. As noted earlier, the primary business of the associations is to receive requests for pilotage, dispatch pilots to the vessels, and collect and disburse pilotage fees. The associations do not supervise the pilots in their work, nor is there a chain of command in the performance of their work – the individual pilot gives navigation advice independently according to his own professional judgment. These two factors therefore weigh against labeling the pilots ADEA employees.

The fourth factor asks to what extent the pilots are able to influence the pilots' associations. Pilots constitute

the entire body of shareholders of their respective associations. Each pilot holds an equal share and participates in the election of directors of the association and in shareholder-approval votes. Thus, the pilots exert substantial influence over the general management of the association as well as the promulgation of association rules and regulations specifically. This factor, too, weighs against labeling the pilots ADEA employees.

The fifth factor asks whether the parties intended that the individual pilot be an employee. Clearly not. Each of the charters of NOBRA and Crescent makes unequivocal that no employment relationship is intended; these charters expressly define the relationship between the pilots and the association as an association for the mutual benefit of the member pilots. This factor also weighs against labeling the pilots ADEA employees.

The sixth factor asks whether the pilots share in the profits, losses, and liabilities of the association. Pilots share in the "profits" of the association (and the "losses" if times are not good) by receiving a share of collected fees according to a set formula agreed upon by the shareholder pilots themselves. At the same time, the associations have no *respondeat superior* liability for the conduct of the pilots, which emphasizes the lack of control over the work of the pilot. Consistent with the fact that pilots act independently according to their own professional judgment in piloting a vessel, pilots remain personally liable for their own negligence. *See McKeithen, supra.* Further, the associations' charters specifically state that the associations are not responsible for debts or faults of their members. This factor also weighs against labeling the pilots ADEA employees.

We conclude that the EEOC's six factors, though not *necessarily exhaustive, are decisive here. Each factor* weighs against finding that the pilot is an employee of the association. The associations obviously are the most important and determinative factor in the work life of a pilot; yet the elements of employer control over an employee fail to describe the character of the power that the associations exercise. It is certainly true that the associations, along with the NOBRA and Crescent Boards and the governor, play an almost monopolistic gate-keeper role in determining who will ultimately work as a river pilot; it is also true that the associations (through their members) set rules and regulations directly affecting the daily work of each pilot. Nevertheless, if *Clackamas* is our guide, the central characteristics of employer control over the pilot are lacking. The associations do not hire or fire pilots, nor can they decommission them; they do not supervise the pilots in their work; and their charters create relationships that cannot be characterized as employee/employer. The pilots do their work independently according to their own professional judgment; they have ultimate control over the associations' rules and regulations that bind them; and they retain personal liability for their own negligence, with no vicarious liability attaching to the associations. Until the United States Supreme Court adopts a wholly different analytical approach from the one provided by *Clackamas,* we think it clear that the pilots are not employees of the associations. It follows that neither of the associations, with fewer than twenty employees, is an employer within the definition of the ADEA.

Accordingly, we hold that the District Court did not err in granting NOBRA and Crescent summary judgment.

B

Coleman does not assert that the Crescent Board itself is an "employer." *See Camacho v. Puerto Rico Ports Authority*, 369 F.3d 570 (1st Cir. 2004). Instead, Coleman argues that the Crescent Board is a joint employer with Crescent. Because we hold that Crescent is not an employer of pilots under the ADEA, it follows that the Crescent Board cannot be a joint employer with Crescent. Accordingly, we hold that the District Court did not err in granting summary judgment to the Crescent Board because it is not an employer under the meaning of the ADEA.

IV

Based on the foregoing considerations, which are, of necessity, narrowly bound to the unique qualities of the pilots' associations presented here, the District Court's grants of summary judgment are

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TERRY C. COLEMAN	**CIVIL ACTION**
VERSUS	**No. 02-3366**
NEW ORLEANS BATON ROUGE STEAMSHIP PILOTS ASSOCIATION	**SECTION: I/2**

ORDER AND REASONS

(Filed Jul. 9, 2004)

On June 1, 2004, this Court entered an order granting a motion for summary judgment filed on behalf of defendant, New Orleans Baton Rouge Steamship Pilots Association ("NOBRA").[1] On June 2, 2004, this Court entered a judgment in favor of NOBRA and against plaintiff, dismissing plaintiff's claims with prejudice.[2] This matter is now before the Court pursuant to a motion, filed on behalf of plaintiff, Terry C. Coleman, for reconsideration or, alternatively, for a new trial.[3] NOBRA opposes the motion.

LAW AND ANALYSIS

The Federal Rules of Civil Procedure do not expressly recognize motions for reconsideration. *See Bass v. United States Dep't of Agriculture,* 211 F.3d 959, 962 (5th Cir. 2000). When a party moves a court to reconsider its grant of summary judgment, the motion will be recharacterized as a motion to alter or amend the judgment pursuant to

---

[1] Rec. Doc. No. 54.

[2] Rec. Doc. No. 56.

[3] Rec. Doc. No. 58.

Fed. R. Civ. P. 59(e) and analyzed accordingly. *St. Paul Mercury Ins. Co. v. Fair Grounds Corp.*, 123 F.3d 336, 339 (5th Cir. 1997); *Laverspere v. Niagra Mach. & Tool Works, Inc.*, 910 F.2d 167, 175 (5th Cir. 1990), *abrogated on other grounds by Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir. 1994).[4]

The governing principles pursuant to which a Rule 59(e) motion is determined were succinctly set forth by the Fifth Circuit in *Templet v. HydroChem Inc.*, 367 F.3d 473, (5th Cir. 2004):

> A Rule 59(e) motion "calls into question the correctness of a judgment." *In re Transtexas Gas Corp.*, 303 F.3d 571, 581 (5th Cir.2002). This Court has held that such a motion is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment. *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir.1990). Rather, Rule 59(e) "serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir.1989) (internal quotations omitted). Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly. *Clancy v. Employers Health Ins. Co.*, 101 F.Supp.2d 463, 465 (E.D.La.2000) (citing 11

---

[4] Plaintiff has styled his motion in the alternative as a motion for a new trial. "[Plaintiff's] motion is a peculiar one to say the least. As no trial was held in the district court, it cannot logically be called a motion for new trial." *St. Paul Mercury Ins. Co.*, 123 F.3d at 339. (construing a motion for a new trial after a grant of summary judgment as a request for reconsideration of summary judgment and treating the motion as Rule 59(e) motion to alter or amend a judgment).

> CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, Federal Practice & Procedure § 2810.1, at 124 (2d ed.1995)).
>
> In *Lavespere [v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167 (5th Cir.1990)], his Court recognized that while a district court has considerable discretion in deciding whether to reopen a case in response to a motion for reconsideration, such discretion is not limitless. 910 F.2d at 174. This Court has identified two important judicial imperatives relating to such a motion: 1) the need to bring litigation to an end; and 2) the need to render just decisions on the basis of all the facts. *Id.* (citations omitted). The task for the district court is to strike the proper balance between these competing interests. *Id.*

Id. at 478-79 (alteration supplied). Moreover, the Fifth Circuit has held that "an unexcused failure to present evidence available at the time of summary judgment provides a valid basis for denying a subsequent motion for reconsideration." *Id.* at 479 (citing *Russ v. Int'l Paper Co.*, 943 F.2d 589, 593 (5th Cir. 1991)).

Plaintiff's motion for reconsideration does not demonstrate any manifest error of law or fact in this Court's judgment. Instead, plaintiff's motion for reconsideration is simply a restatement of the arguments and evidence presented to and considered by this Court with respect to NOBRA's motion for summary judgment. Additionally, although plaintiff has attached deposition evidence to the motion for reconsideration that was not presented to this Court in opposition to the motion for summary judgment, plaintiff has not provided any justification for his failure to present such evidence in connection with the summary judgment motion. Plaintiff does not contend, nor could he

contend, that the deposition is "newly discovered" evidence. The deposition was taken on April 19, 2004,[5] well before NOBRA filed its motion for summary judgment on May 12, 2004.[6] Moreover, plaintiff makes no argument with respect to the relevance or importance of this deposition testimony.

Because the motion for reconsideration is supported by legal theories and arguments that have been considered by this Court and because those arguments are supported by references to evidence that either was, or could have been, considered by this Court prior to the entry of judgment, the Court concludes that the "judicial imperative" of finality outweighs the need for this Court to exercise its discretion and reopen this case in response plaintiff's Rule 59(e) motion.

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that the motion of plaintiff, Terry C. Coleman, for reconsideration be and hereby is **DENIED**.

New Orleans, Louisiana, July 8, 2004.

/s/ Lance M. Africk
LANCE M. AFRICK
UNITED STATES
DISTRICT JUDGE

---

[5] Rec. Doc. No. 58, Ex. A., at 1.

[6] *See* Rec. Doc. No. 45. In any event, the deposition testimony submitted by plaintiff is merely cumulative of evidence submitted in plaintiff's opposition to NOBRA's summary judgment and has been submitted in support of an argument considered, and rejected, by this Court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TERRY C. COLEMAN	**CIVIL ACTION**
VERSUS	**No. 02-3366**
NEW ORLEANS BATON ROUGE STEAMSHIP PILOTS ASSOCIATION	**SECTION: I/2**

ORDER AND REASONS

(Filed Jun. 1, 2004)

This matter is before the Court pursuant to a motion, filed on behalf of defendant, New Orleans Baton Rouge Steamship Pilots Association ("NOBRA"), to dismiss or, alternatively, for summary judgment.[1]

Plaintiff, born October 6, 1951, filed this action alleging that NOBRA unlawfully discriminated against him on the basis of his age by failing to elect him into the river pilot apprenticeship program, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"). The NOBRA charter prohibits anyone aged forty-five or older from becoming a member of NOBRA.[2] NOBRA moves for summary judgment asserting that NOBRA is not an "employer" and, therefore, is not subject to liability pursuant to the ADEA.

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

---

[1] Rec. Doc. No. 45.

[2] *See* Rec. Doc. No. 47, Ex. 8, at 12.

any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Once the moving party carries its burden pursuant to Rule 56(c), the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). That burden is not satisfied by creating merely some metaphysical doubt as to the material facts, by conclusory allegations, unsubstantiated assertions or by only a scintilla of evidence. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (citations omitted).

The ADEA prohibits an "employer," "employment agency," or "labor organization" from discriminating against individuals on the basis of their age.[3] *See* 29 U.S.C. § 623(a)-(c). With respect to "employers," the Act provides:

> It shall be unlawful for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

---

[3] Although plaintiff cites to 29 U.S.C. § 623(c) which prohibits age discrimination by "labor organizations," plaintiff neither alleged in his complaint that NOBRA is a labor organization nor does he advance any such argument in opposition to the instant motion. Additionally, plaintiff does not argue that NOBRA is an "employment agency" within the meaning of the ADEA. Accordingly, this Court addresses only the threshold issue of whether NOBRA is an "employer."

> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C.A. § 623(a). 29 C.F.R. § 1625.21 provides in pertinent part:

> All apprenticeship programs, including those apprenticeship programs created or maintained by joint labor-management organizations, are subject to the prohibitions of sec. 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 623.

The Fifth Circuit has set forth a two-step process for determining whether a defendant is an "employer" pursuant to the ADEA:

> First, the defendant must fall within the statutory definition. Second, there must be an employment relationship between the plaintiff and the defendant. *See generally, Fields v. Hallsville Indep. Sch. Dist.,* 906 F.2d 1017, 1019 (5th Cir.1990), *cert. denied,* 498 U.S. 1026, 111 S.Ct. 676, 112 L.Ed.2d 668 (1991).

Deal v. State Farm County Mut. Ins. Co. of Texas, 5 F.3d 117, 118 (5th Cir. 1993). The Act defines an "employer" as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 29 U.S.C. § 630(b).

Plaintiff argues that the river pilots are "employees" of NOBRA. It is undisputed that NOBRA has a membership of more than twenty pilots.[4] Additionally, the defendant's summary judgment evidence that NOBRA has less than twenty employees absent the inclusion of the river pilots is unrebutted. Therefore, plaintiff's claim turns on whether an employment relationship exists between NOBRA and the river pilots.

The issue of whether a statutorily authorized Louisiana river pilot association is an "employer" within the meaning of the ADEA was addressed in *Ehret v. State of Louisiana,* 862 F.Supp. 1546 (E.D.La. 1992). In that case, plaintiff sued the Crescent River Port Pilot's Association (the "Association") and the Board of River Port Pilot Commissioners for the Port of Orleans alleging that the Association's rule limiting entry into the Association's apprenticeship program to individuals who had not passed their fortieth birthday violated the ADEA. *Id.* at 1548. Applying the Fifth Circuit's hybrid "economic realities/common law control" test for determining whether an employment relationship exists,[5] the court held that the

---

[4] Plaintiff has cited no case in which river pilots were hold to be "employees"

[5] The "economic realities/common law control" test is set forth in *Fields v. Hallsville Indep. Sch. Dist.,* 906 F.2d 1017 (5th Cir. 1990). Pursuant to that test, "the right to control an employee's conduct is the most important factor.'" *Id.* at 1019 (citation omitted). "[I]f an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist." *Id.* (internal quotation and citation omitted). Other relevant factors include:

> (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or

(Continued on following page)

Crescent River Port Pilot's Association was not an "employer" of the river pilots within the meaning of the ADEA. *Ehret,* 862 F.Supp. at 1549-51.[6] The Court concluded:

> The ADEA does not prevent all age discrimination against those who work for a living. Whatever the merits of the age restriction included in the river port pilot apprenticeship program, the Court finds that the Board and the Association are not employers covered by the ADEA. . . .

Id. at 1552; *see also Camacho v. Puerto Rico Ports Authority,* ___ F.3d ___, 2004 WL 1143719, at *4-6 (1st Cir. May 21, 2004) (applying a common law agency test and holding that the Puerto Rico Ports Authority is not a de facto employer of harbor pilots for purposes of liability pursuant to the ADEA notwithstanding some control over the harbor pilot's day-to-day activities) (citing *Ehret*).

> is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; *i.e.,* by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.

Fields, 906 F.2d at 1020 n.4.

[6] In *Ehret,* the court also held that the Board of Commissioner's was not an "employer," nor were the Association and the Board "joint employers." *Ehret,* 862 F.Supp. at 1551-52.

Plaintiff argues that the analysis in *Ehret* is no longer sound because 29 C.F.R. § 1625.21, enacted subsequent to *Ehret,* expands the coverage of the ADEA to apprenticeship programs. In the present case, the EEOC, relying solely upon 29 C.F.R. § 1625.21, determined that the rules of NOBRA and the Board of Examiners for New Orleans and Baton Rouge Steamship Pilots, which prohibit any person forty-five or more years of age from becoming a river pilot, discriminate on the basis of age and constitute a class-wide violation of the ADEA.[7] Quoting the EEOC Compliance Manual, the EEOC stated, "[d]iscrimination against a participant in an apprenticeship or training program that is required prior to employment, or that commonly leads to regular employment, also constitutes discrimination against an applicant for employment, and is prohibited because it has the effect of discriminatorily denying someone an employment opportunity."[8]

Although the Court agrees with the EEOC that 29 C.F.R. § 1625.21 expands the coverage of the ADEA to applicants for apprenticeship programs, the regulation does not expand the classes of persons liable pursuant to the ADEA as set forth in 29 U.S.C. § 623. To the contrary, the regulation explicitly provides that "[a]ll apprenticeship programs . . . *are subject to the prohibitions of sec. 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 623.*" (emphasis supplied). In turn, 29 U.S.C. § 623 prohibits an employer, employment agency, or labor organization from discriminating based upon age. *See* § 623(a)-(c). Finding that plaintiff was an applicant to

---

[7] *See* Rec. Doc. No. 47, Ex. 7., EEOC determination letter, at 2.

[8] *Id.*

an apprenticeship program, the EEOC failed to address whether, as a threshold issue, NOBRA was an "employer" subject to liability pursuant to the Act. Plaintiff has offered no support for the proposition that the regulation expands the definitions of persons and entities Congress identified as potentially liable pursuant to the ADEA. The Court finds that *Ehret's* holding that a Louisiana pilot association, organized pursuant to the Louisiana statutory scheme governing compulsory river pilots, is not an "employer" of river pilots is unaffected by the enactment of 29 C.F.R. § 1625.21.[9]

---

[9] Albeit in other contexts, courts have stated that a river pilot association is not an employer and that river pilots are independent contractors. For example, in *McKeithen v. S.S. Frosta,* 441 F.Supp. 1213, the court held that NOBRA was not the employer of river pilots for purposes of assessing its tort duty to third persons. *Id.* at 1216. The Court noted:

> The pilots association is a voluntarily formed non-profit corporation. The formation of the association is permitted by L.S.A.-R.S. 34:1047, which provides for self-regulation not in conflict with law or the rules and regulations of the Board of Commissioners. The association maintains a central office where it receives requests for pilotage. It maintains a roster of pilots available for duty and dispatches them to vessels on a rotating basis. It collects the pilots' fees, pays general overhead expenses from these receipts and remits the remaining receipts on a monthly basis to the individual member pilots according to an established formula based on the number of days each individual was available for piloting vessels. The association does not take out withholding tax or FICA on monies distributed to the pilot members because they are self-employed. The association files an annual federal income tax return on a corporate form (Form 1099), but does not pay taxes as an entity. [*See Mobile Bar Pilots Assoc. v. C I R.,* 97 F.2d 695 (5th Cir. 1938)]. It does not accrue profits of its own from the pilots' work.

Id. at 1216 (E.D. La. 1977). Based on the above facts, which exist in the instant case, the court held that "[t]his association is not the employer

(Continued on following page)

Upon consideration of the motion, the opposition, the law, and the summary judgment evidence submitted by the parties, the Court finds the reasoning set forth in *Ehret* is persuasive and applicable to this case.[10] Further, the Court finds that plaintiff's summary judgment evidence is insufficient to raise a genuine issue of material fact with respect to whether NOBRA is an "employer" within the meaning of the ADEA. Accordingly, NOBRA cannot be held liable pursuant to the ADEA. Although the Court expresses grave doubts as to the wisdom or logic behind NOBRA's age restriction, this Court is bound by the specific statutory classes of persons and entities enumerated by Congress to which the ADEA applies.

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that the motion of defendant, New Orleans Baton Rouge Steamship Pilots Association, for summary judgment is **GRANTED** and plaintiff's claim is hereby **DISMISSED**.

---

of the pilots nor is it a partnership of pilots." *Id; see also Blancq v. Hapag-Lloyd A.G.*, 968 F.Supp. 376, 381 & n.6 (E.D.La. 1997) (noting that a river pilot is "typically considered an independent contractor" and citing cases).

[10] NOBRA operates similarly to the Crescent River Port Pilots Association, *See Id.* at 1550 n.6 (noting the similarity). Plaintiff in the instant case has not brought a claim against the Board of Examiners for New Orleans and Baton Rouge Steamship Pilots in this litigation. Although plaintiff contends that NOBRA exercises influence with respect to who the Board certifies for election to the apprenticeship program, it is undisputed that the final decision with respect to who is certified to be included in the apprenticeship election lies with the Board.

New Orleans, Louisiana, May 31, 2004.

/s/ Lance M. Africk
LANCE M. AFRICK
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TERRY C. COLEMAN	**CIVIL ACTION**
VERSUS	**No. 02-2775 c/w 02-3247**
CRESCENT RIVER PORT PILOTS ASSOCIATION, INC.	**SECTION: 1/2**

ORDER AND REASONS

(Filed Jul. 23, 2004)

On June 7, 2004, this Court entered an order granting motions for summary judgment filed in these consolidated actions on behalf of defendants, Crescent River Port Pilots Association, Inc. and the Board of River Port Pilot Commissioners.[1] On that same date, this Court entered a judgment in favor of defendants and against plaintiff, dismissing plaintiff's claims with prejudice.[2] This matter is now before the Court pursuant to a motion, filed on behalf of plaintiff, Terry C. Coleman, for reconsideration or, alternatively, for a new trial.[3] Defendants oppose the motion.

LAW AND ANALYSIS

The Federal Rules of Civil Procedure do not expressly recognize motions for reconsideration. *See Bass v. United*

---

[1] *Coleman v. Crescent River Port Pilots Association, Inc.*, Civil Action 02-2775, Rec. Doc. 58; *Coleman v. Board of River Port Pilots Commissioners*, Civil Action 02-3247, Rec. Doc. No. 7.

[2] *Crescent River Port Pilots Association*, Rec. Doc. No. 59; *Board of River Port Pilots Commissioners*, Rec. Doc. No. 8.

[3] *Crescent River Port Pilots Association*, Rec. Doc. No. 60.

States Dept of Agriculture, 211 F.3d 959, 962 (5th Cir. 2000). When a party moves a court to reconsider its grant of summary judgment, the motion will be recharacterized as a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) and analyzed accordingly. *St. Paul Mercury Ins. Co. v. Fair Grounds Corp.*, 123 F.3d 336, 339 (5th Cir. 1997); *Laverspere v. Niagra Mach. & Tool Works, Inc.*, 910 F.2d 167, 175 (5th Cir. 1990), *abrogated on other grounds by Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir. 1994).[4]

The governing principles pursuant to which a Rule 59(e) motion is determined were succinctly set forth by the Fifth Circuit in *Templet v. HydroChem Inc.*, 367 F.3d 473, (5th Cir. 2004):

> A Rule 59(e) motion "calls into question the correctness of a judgment." *In re Transients Gas Corp.*, 303 F.3d 571, 581 (5th Cir.2002). This Court has held that such a motion is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment. *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir.1990), Rather, Rule 59(e) "serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence," *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir.1989) (internal quotations omitted),

---

[4] Plaintiff has styled his motion in the alternative as a motion for a new trial. "[Plaintiff's] motion is a peculiar one to say the least. As no trial was held in the district court, it cannot logically be called a motion for new trial." *St. Paul Mercury Ins. Co.*, 123 F.3d at 339, (construing a motion for a new trial after a grant of summary judgment as a request for reconsideration of summary judgment and treating the motion as Rule 59(c) motion to alter or amend a judgment).?? [1] Rec. Doc. Nos.

> Reconsideration of a judgment after its entry is an extraordinary remedy that should he used sparingly. *Clancy v. Employers Health Ins. Co.*, 101 F.Supp.2d 463, 465 (E.D.La.2000) (citing 11 CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, Federal Practice & Procedure § 2810.1, at 124 (2d ed.1995)),
>
> In *Lavespere* [*v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167 (5th Cir.1990)], this Court recognized that while a district court has considerable discretion in deciding whether to reopen a case in response to a motion for reconsideration, such discretion is not limitless, 910 F.2d at 174. This Court has identified two important judicial imperatives relating to such a motion: 1) the need to bring litigation to an end; and 2) the need to render just decisions on the basis of all the facts. *Id.* (citations omitted). The task for the district court is to strike the proper balance between these competing interests. *Id.*

Id. at 478-79 (alteration supplied). Moreover, the Fifth Circuit has held that "an unexcused failure to present evidence available at the time of summary judgment provides a valid basis for denying a subsequent motion for reconsideration." *Id.* at 479 (citing *Russ v. Int'l Paper Co.*, 943 F.2d 589, 593 (5th Cir.1991)).

Plaintiff's motion for reconsideration does not demonstrate any manifest error of law or fact in this Court's judgment. Instead, plaintiffs motion for reconsideration is simply a restatement of the arguments and evidence presented to and considered by this Court with respect to defendants' motions for summary judgment. Additionally, although plaintiff has attached additional documentary evidence, specifically, Crescent's "Work Rules," to the

motion for reconsideration which was not presented to this Court in opposition to the motion for summary judgment, plaintiff has not provided any justification for his failure to present such evidence in connection with the summary judgment motion. Plaintiff does not contend that the Work Rules are "newly discovered" evidence.

Because the motion for reconsideration is supported by legal theories and arguments that have been considered by this Court and because those arguments are supported by references to evidence that either was, or could have been, considered by this Court prior to the entry of judgment, the Court concludes that the "judicial imperative" of finality outweighs the need for this Court to exercise its discretion and reopen this case in response plaintiff's Rule 59(e) motion.

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that the motion of plaintiff, Terry C. Coleman, for reconsideration be and hereby is **DENIED**.

New Orleans, Louisiana, July 22, 2004.

/s/ Lance M. Africk
LANCE M. AFRICK
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TERRY C. COLEMAN	**CIVIL ACTION**
VERSUS	**No. 02-2775 c/w 02-3247**
CRESCENT RIVER PORT PILOTS ASSOCIATION, INC.	**SECTION: 1/2**

ORDER AND REASONS

(Filed Jun. 7, 2004)

Before the Court in these consolidated cases are motions for summary judgment, filed on behalf of defendants, Crescent River Port Pilots Association, Inc. and the Board of River Port Pilot Commissioners.[1]

Plaintiff, born October 6, 1951, filed these consolidated actions alleging that defendants unlawfully discriminated against him on the basis of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"), Defendants now move for summary judgment asserting that they are not "employers" or "joint employers" and, therefore, they are not subject to liability pursuant to the ADEA.

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Once the moving

[1] Rec. Doc. Nos. 35, 36.

party carries its burden pursuant to Rule 56(c), the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). That burden is not satisfied by creating merely some metaphysical doubt as to the material facts, by conclusory allegations, unsubstantiated assertions or by only a scintilla of evidence. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (citations omitted).

Upon consideration of the motions, the opposition, the summary judgment evidence, and the law, for the reasons assigned in *Ehret v. State of Louisiana*, 862 F.Supp. 1546 (E.D.La. 1992), and this Court's opinion in *Coleman v. New Orleans Baton Rouge Steamship Pilots Association*, Civil Action 02-3366, Order and Reasons, Rec. Doc. No. 54 (E.D.La. June 1, 2004), the Court finds that there is no genuine issue of material fact with respect to whether the Crescent River Port Pilots Association, Inc. or the Board of River Port Pilot Commissioners is an "employer" or "joint employer" subject to liability pursuant to the ADEA. Therefore, defendants are entitled to a judgment as a matter of law.

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that the motions of defendants, Crescent River Port Pilots Association, Inc. and the Board of River Port Pilot Commissioners, for summary judgment are **GRANTED** and plaintiff's claims in these consolidated actions are hereby **DISMISSED**.

New Orleans, Louisiana, June 7, 2004.

/s/ Lance M. Africk
LANCE M. AFRICK
UNITED STATES
DISTRICT JUDGE

FILED
MAY 22 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1347

In The
Supreme Court of the United States

TERRY C. COLEMAN,

Petitioner,

v.

NEW ORLEANS and BATON ROUGE STEAMSHIP PILOTS' ASSOCIATION, CRESCENT RIVER PORT PILOTS' ASSOCIATION, and BOARD OF RIVER PORT PILOT COMMISSIONERS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

PETER J. BUTLER, JR.*
RICHARD G. PASSLER
BREAZEALE, SACHSE & WILSON, L.L.P.
909 Poydras Street, Suite 1500
New Orleans, Louisiana 70112
(504) 584-5454

*Counsel of Record

Attorneys for Respondent, Crescent River Port Pilots' Association

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

There are three primary and several secondary issues presented in the Petition. The lower courts resolved the first primary issue in favor of defendants, rendering the remaining issues moot.

I. Is the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, which is the sole basis for petitioner's claims, applicable to the Crescent River Port Pilots' Association and/or the Board of River Port Pilot Commissioners?

   a. Are commissioned River Port Pilots "employees" (as that term is defined by the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*) of the Crescent River Port Pilots' Association and/or the Board of River Port Pilot Commissioners; or, as held by the lower courts, are commissioned River Port Pilots "independent contractors?"

   b. Does 29 C.F.R. § 1625.21 expand the scope of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* beyond the context of an employee/employer relationship?

II. Did petitioner make out a *prima facie* case of discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*?

   a. Was petitioner qualified to be a candidate for River Port Pilot apprentice under the regulations duly promulgated by the Board of River Port Pilot Commissioners, despite his:

      1. lack of appropriate United States Coast Guard licensure; and

QUESTIONS PRESENTED – Continued

2. prior felony convictions for possession with intent to distribute narcotics?

b. Was there a duty on the part of the Crescent River Port Pilots' Association and/or the Board of River Port Pilot Commissioners to assist petitioner in obtaining the United States Coast Guard licensure he needed in order to be qualified as a candidate for River Port Pilot apprentice?

III. Since petitioner was not deemed qualified as a candidate for River Port Pilot apprentice by the Board of River Port Pilot Commissioners and, thus, did not appear on the ballot from which the members of the Crescent River Port Pilots' Association selected apprentices, was there any discrimination in fact against petitioner by the Crescent River Port Pilots' Association?

CORPORATE DISCLOSURE

Respondent Cresent River Port Pilots' Association is a non-profit Louisiana corporation. There are no parent corporations or publicly held companies owning 10% or more of Respondent's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	viii
STATEMENT OF THE CASE	1
I. The Relationship between the involved entities	3
A. River Port Pilots	3
B. Crescent River Port Pilots' Association	4
C. Board of River Port Pilot Commissioners for the Port of New Orleans	6
II. The Process to Becoming a Commissioned River Port Pilot	8
A. The River Port Pilots Determine a Need for More Pilots and Notify the Board	9
B. The Board Considers Applications (a/k/a petitioners) from Individuals	9
C. The Board Certifies Those Petitioners Who are Qualified as Candidates for River Port Pilot Apprenticeship	9
D. The River Port Pilots Select an Appropriate Number of Apprentices	10
E. The Board Certifies and Governor Commissions	10
III. Coleman was not qualified to be a candidate for River Port Pilot apprentice under the regulations duly promulgated by the Board	11

TABLE OF CONTENTS – Continued

Page

1. Coleman has two prior felony convictions ... 11
2. Coleman lacked the appropriate qualifying USCG Licenses ... 12
3. There was no duty on the part of defendants to assist Coleman in obtaining the USCG Licenses he needs in order to qualify as a candidate for River Port Pilot Apprentice ... 13
4. As he was not qualified, the River Port Pilots could not select Coleman as an apprentice ... 14

SUMMARY OF ARGUMENT ... 15

REASONS FOR DENYING THE WRIT ... 16

I. The ADEA (which is the sole basis for Coleman's claims) is inapplicable because Commissioned River Port Pilots are not employees of the Association or the Board; rather, they are independent contractors ... 16

A. The district court's test: *Ehret* ... 19

B. The Fifth Circuit's test: *Clackamas* ... 22

II. 29 C.F.R. § 1625.21 does not expand the scope of the ADEA beyond the context of an employee/employer relationship ... 26

III. The Work Rules were properly not considered; regardless, they are irrelevant ... 28

CONCLUSION ... 29

TABLE OF CONTENTS – Continued

Page

APPENDIX

Louisiana Revised Statutes
Title 34. Navigation and Shipping
Chapter 6. Pilots
Part I. Port of New Orleans
Subpart B. River Port Pilots

§ 991. Board of River Port Pilot Commissioners; duties, appointment, qualification, and removal of members ..... App. 1

§ 991.1. Repealed by Acts 2004, No. 902, § 2, eff. Jan 1, 2005 ..... App. 3

§ 992. River port pilots; duties; appointment ..... App. 3

§ 993. Examinations for appointment; qualifications ..... App. 3

§ 994. Oath; bond ..... App. 4

§ 995. Association of river port pilots ..... App. 4

§ 996. Operating territory ..... App. 4

§ 997. Pilotage fees; vessel subject to pilotage ..... App. 5

§ 998, 999. Repealed by Acts 1986, No. 960, § 2 ..... App. 6

§ 1000. Privilege for charges and attorney's fees ..... App. 6

§ 1001. Repealed by Acts 2004, No. 902, § 2, eff. Jan. 1, 2005 ..... App. 6

§ 1002. Violations and penalties ..... App. 6

§ 1002.1. Employing pilot without a state commission; penalties ..... App. 6

TABLE OF CONTENTS – Continued

Page

§ 1003, 1004. Repealed by Acts 1986, No. 960, § 2 .....App. 7

§ 1005. Privilege, communications between river port pilot and Board of River Port Pilot Commissioners .....App. 7

§ 1006. Blank .....App. 7

§ 1007. Repealed by Acts 1968, No. 579, § 8 .....App. 7

§ 1008. Repealed by Acts 1986, No. 960, § 2 .....App. 7

§ 1009. Employing pilot without a commission; liability of vessel, master, and owner .....App. 7

TABLE OF AUTHORITIES

Page

CASES

Barrow v. New Orleans Steamship Ass'n, 10 F.3d 292 (5th Cir. 1994) 20

Blancq v. Hapag-Lloyd A.G., 986 F. Supp. 376 (E.D. La. 1997) 20

Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440 (2003) 23

Coleman v. New Orleans and Baton Rouge Steamship Pilots' Ass'n, 437 F.3d 471 (5th Cir. 2006) .....*passim*

Dampskibsselskabet Atlanta A/S v. The United States, 31 F.2d 961 (5th Cir. 1929) 22

E.E.O.C. v. Joint Apprenticeship Committee of Joint Industry Bd., 186 F.3d 110 (2nd Cir. 1990) 27

Ehret v. State of Louisiana, 862 F. Supp. 1546 (E.D. La. 1992) .....*passim*

Fields v. Hallsville Indep. School Dist., 906 F.2d 1017 (5th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991) 16, 19

Fruge v. Parker Drilling Co., 337 F.3d 558 (5th Cir. 2003), *cert. denied*, 540 U.S. 1161 (2004) 21

Guy v. Donald, 203 U.S. 399 (1906) 22

Hickey v. Arkla Industries, Inc., 699 F.2d 748 (5th Cir. 1983) 17

In re China Union Lines, Ltd., 342 F. Supp. 426 (E.D. La. 1971) 6

Koepp v. Sea-land Service, Inc., 645 So.2d 1269 (La. App. 4 Cir. 1994) 22

TABLE OF AUTHORITIES – Continued

Page

Kotch v. Board of River Port Pilot Com'rs for Port of New Orleans, 25 So.2d 527 (La. 1946), *affirmed*, 330 U.S. 552 (1947), *rehearing denied*, 331 U.S. 864 (1947) 5

McKeithen v. S.S. Frosta, 441 F. Supp. 1213 (E.D. La. 1977) ..... *passim*

Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318 (1992) 26

STATUTES AND REGULATIONS

29 U.S.C. § 621 ..... 1, 26

29 U.S.C. § 623 ..... 17, 27

29 U.S.C. § 630 ..... 17, 18

29 C.F.R. § 1625.21 ..... 26, 27

La. R.S. 34:991 ..... 6, 7, 9, 10

La. R.S. 34:992 3

La. R.S. 34:993 ..... 9, 10, 11

La. R.S. 34:997 ..... 4, 5

La. R.S. 34:1000 5

La. R.S. 34:1001 22

Louisiana Register, Volume 21, No. 7, July 20, 1995 7

STATEMENT OF THE CASE

Terry Coleman (Coleman), a two-time convicted drug felon without the appropriate licenses from the United States Coast Guard (USCG), attempted to become a river port pilot. He sued the Crescent River Port Pilots' Association (Association) and the Board of River Port Pilot Commissioners (Board)[1] under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* because he was not selected by the Association's members as an apprentice. The district court granted Defendants' summary judgment motions on the basis that neither defendant is an employer within the meaning of the ADEA because of a lack of an employer-employee relationship and, thus, cannot be held liable under the ADEA. The district court denied Coleman's request for reconsideration. The United States Court of Appeals for the Fifth Circuit (Fifth Circuit) affirmed.[2]

Coleman's "Statement of the Case" has almost nothing to do with the undisputed material facts upon which the summary judgment was granted or on which it was affirmed. Rather, those "facts" are predominantly ***irrelevant and disputed allegations*** (if not outright inappropriate and unsubstantiated character assassination). The material, undisputed facts are:

1. In 1985, Coleman was convicted in the United States District Court for the Eastern District of Louisiana of possession with intent to distribute cocaine.

---

[1] Coleman's separate suit against the Board was removed and consolidated with his suit against the Association.

[2] 437 F.3d 471 (5th Cir. 2006).

2. In 1986, Coleman was convicted in the 24th Judicial District Court, Parish of Jefferson, State of Louisiana, of possession with intent to distribute marijuana.

3. On or about February 29, 1999, Coleman submitted a petition to the Board seeking to become a commissioned river port pilot.

4. Coleman did not at any time pertinent hereto hold the appropriate USCG First Class Pilot License (USCG License) of steam or motor vessel of any gross tons for any of the following four waterways: (a) Mississippi River from Southport Mile 104.7 to the Head of Passes Mile 0.0; (b) The Inner Harbor Navigation Canal (Industrial Canal) from the Mississippi River to Lake Pontchartrain; (c) The Intracoastal Waterway (ICW) from the intersection of the Industrial Canal and the ICW to and including Michoud Canal, or; (d) The Mississippi River Gulf Outlet, from the intersection of the ICW to Mile 28.3, the present location of Beacon #78 (collectively, the USCG Licenses).

5. The USCG requires as a condition and/or prerequisite for taking the test to obtain each of the USCG Licenses, a certain amount of experience in the wheelhouse of vessels traversing the particular waterway to which the license applies. The USCG does not require that this experience be obtained in the presence of a commissioned river port pilot. This experience can be obtained in a variety of ways without the assistance of a commissioned river port pilot.

6. The Board is charged with the duty of establishing the qualifications of river port pilots and providing for the examination and approval of apprenticeship programs for river port pilots.

7. Qualifications established by the Board include the USCG Licenses and good moral character.

8. Coleman did not meet the qualifications established by the Board; and was not certified by the Board as a qualified candidate for river port pilot apprentice.

9. By law, Association members can only consider, and select, candidates for the apprenticeship program who have been certified as qualified by the Board.

10. Coleman did not appear on the ballot of candidates for the apprenticeship program in 1999 because he had not been certified as a qualified candidate by the Board.

11. Neither the Association, the Board nor the owners/masters of the vessels piloted by river port pilots, exercise operational control over the work of river port pilots.

I. The Relationship between the involved entities

A. River Port Pilots

Pursuant to power deferred to it by federal law, Louisiana adopted legislation providing that "[t]here shall be a body of pilots known as the 'River Port Pilots' whose duty it shall be to provide pilotage services within the operating territory described in this Subpart." La. R.S. 34:992(A). River Port Pilots are commissioned by the Governor of the State of Louisiana after being certified as being qualified for such a commission by the Board (*i.e.*, not by the Association). La. R.S. 34:992(B).

B. Crescent River Port Pilots' Association

The Association is a non-profit corporation organized under Louisiana law which functions as a voluntary association. Its purpose is to provide organizational and billing services for its members. The Association coordinates the scheduling and dispatching of its members to ships and vessels requiring pilotage services on an equitable basis; and bills for and distributes the fees earned by its River Port Pilot members/shareholders from shipowners.

The Association's "members" are its shareholders. Each member of the Association owns one share of Association stock. An individual is not eligible to be a member/shareholder of the Association unless he or she possesses a commission as a River Port Pilot. Only the Governor has the ability to commission an individual as a River Port Pilot. No member of the Association is an employee of the Association. To the contrary, the members of the Association are the owners of the Association.

By law, when a ship travels in the Mississippi River, the shipowner must retain, or hire, a commissioned River Port Pilot to provide pilotage services. La. R.S. 34:997(D).[3]

---

[3] One of the most egregious of the numerous misrepresentations in Coleman's Petition is found on page 12 where he states that "A pilot cannot work on the Crescent stretch of the river unless he is a Crescent pilot." This is false. Upon receiving a commission from the Governor as a River Port Pilot an individual is not required to join (*i.e.*, purchase a share of stock in) the Association. If he were to so choose, he could legally work as a River Port Pilot without becoming a member of the Association and pilot ships on the stretch of the river assigned by law to River Port Pilots. In fact, there is evidence in the record that a River Port Pilot whose membership in the Association was terminated, but who retained his commission as a River Port Pilot, continued to work as a commissioned River Port Pilot on the Mississippi River.

That retention is an independent contract between the shipowner and the individual commissioned River Port Pilot. Pursuant to that independent contract, the commissioned River Port Pilot provides pilotage services for the ship and the shipowner must pay the commissioned River Port Pilot for such services. La. R.S. 34:997(A) and La. R.S. 34:1000. As agent for its member pilots, the Association bills each shipowner for the pilotage fees owed to the River Port Pilot hired by that shipowner. If a shipowner does not pay, it is the responsibility of the individual member/pilot (*i.e.*, not the Association) to institute legal proceedings against the shipowner. La. R.S. 34:1000.

Article XII of the Association's Charter governing its operations provides that pilotage fees are earned by the pilot (*i.e.*, not the Association), but are collected by the Association as the agent for the individual Association members. The Association deducts general overhead and administrative expenses from the pilotage fees received from shipowners, and remits the remaining amounts to its individual member pilots. The Association does not deduct or withhold any taxes or FICA fees from the monies distributed to its pilot members. The Association does not accrue profits as it is a non-profit corporation. The Association is not the employer of its members. *Kotch v. Board of River Port Pilot Com'rs for Port of New Orleans*, 25 So.2d 527 (La. 1946), *affirmed*, 330 U.S. 552 (1947), *rehearing denied*, 331 U.S. 864 (1947); *Ehret v. State of Louisiana*, 862 F. Supp. 1546, 1548 (E.D. La. 1992); *McKeithen v. S.S. Frosta*, 441 F. Supp. 1213 (E.D. La.

1977); *In re China Union Lines, Ltd.*, 342 F. Supp. 426 (E.D. La. 1971).[4]

C. Board of River Port Pilot Commissioners for the Port of New Orleans

The Board is established by Louisiana law providing that it "shall consist of three citizens appointed by the Governor with the consent of the Senate, who presently hold a commission as a river port pilot. . . ." La. R.S. 34:991(A). The Board "shall" formulate rules and regulations "establishing qualifications of river port pilots and providing for the examination and approval of apprenticeship programs for the river port pilots, and to administer

---

[4] Coleman's Petition implies at pages 12 and 14 that the Association has the discretion to expel a member from the Association; and that such a pilot, having been expelled from the Association, could not thereafter legally pilot vessels "on the Crescent stretch of the river." This is false in both respects and Coleman has not cited any authority in support of these propositions. Although a member of the Association can resign from the Association at any time, the Association can only expel one of its members under two circumstances. First, where an Association member has been deprived permanently of his commission as a River Port Pilot by the Governor or his USCG Licenses by the USCG, he can be expelled from the Association. Second, a member can be expelled from the Association when he has not paid assessed fines in excess of a particular amount. Thus, Coleman's assertion that the Association can terminate a shareholder's membership in the Association, at will, is simply false. Moreover, membership in the Association is voluntary, not compulsory; and there is no requirement that a commissioned River Port Pilot must join the Association. A properly licensed and commissioned River Port Pilot can pilot vessels irrespective of whether he is a member of the Association. Where a pilot has been expelled from the Association on the grounds that he has been deprived permanently of his commission as a River Port Pilot or of his USCG Licenses, that individual would no longer be a commissioned River Port Pilot; and, thus, he could not pilot ships on the river, not because he was no longer an Association member, but because he was no longer a licensed and commissioned River Port Pilot.

the evaluation and examination of river port pilots." La. R.S. 34:991(B)(1).

The rules and regulations promulgated by the Board in accordance with La. R.S. 34:991(B)(1) were published in the Louisiana Register, Volume 21, No. 7, July 20, 1995, at p. 703-706 and provide in pertinent part:

Section 4. Apprenticeship

Rule 1

All petitions for commissions to act as river port pilots must be in writing, must be signed by the petitioner, and presented to the secretary of the board. All petitions must be accompanied by satisfactory evidence of compliance with the following prerequisites:

1. Petitioner must be of good moral character. Evidence of a clear police record will be considered, but the board reserves the right to examine other sources of information as to the applicant's character.

. . . .

Rule 2

Before being accepted as a candidate to become a river port pilot, each petitioner must meet the below listed requirements:

1. Each petitioner must hold a United States Coast Guard First Class Pilot License of steam or motor vessel of any gross tons for [four (4) specifically defined waterways].

The Board's Rules define "petitioner," "candidate" and "apprentice" as follows:

Section 1. Terms

. . . .

7. Petitioner - one who submits a petition to become a river port pilot.

8. Candidate - one whose petition has been certified by the board.

9. Apprentice - one who has been selected to become a river port pilot pending successful completion of the apprenticeship program.

II. The Process to Becoming a Commissioned River Port Pilot

Increasing the number of commissioned River Port Pilots is a multi-step process controlled by statutes adopted by the Louisiana Legislature and regulations promulgated by the Board (*i.e.*, not the Association). In this regard, the pertinent statute provides as follows:

> Whenever there exists a necessity for more pilots as determined by the river port pilots, the Board of River Port Pilot Commissioners shall hold examinations under such rules and regulations and such requirements as they shall have provided, with the governor's approval; however, no applicant shall be considered by the [B]oard unless he submits proper evidence of moral character and is a voter of this state, and shall have completed an approved apprenticeship program within the geographic area affected by this Subpart. The Board of River Port Pilot Commissioners shall issue a certificate to the governor that the applicant has satisfied the requirements of this Subpart. The governor may then, in his discretion, appoint said applicant to existing vacancies.

La. R.S. 34:993. The specific steps followed in the process are as follows:

A. The River Port Pilots Determine a Need for More Pilots and Notify the Board

Before any new River Port Pilots can be commissioned, the existing River Port Pilots must first determine that there is a need for additional pilots. La. R.S. 34:993. Once such a determination has been made, the River Port Pilots, through the Association as their agent, notify the Board that there is a demand for additional River Port Pilots. *Id.*[5]

B. The Board Considers Applications (a/k/a Petitions) From Individuals

Once the River Port Pilots have notified the Board that there is a need for additional River Port Pilots, the Board (not the Association) begins considering applications from prospective River Port Pilots. These prospective River Port Pilots are known as "petitioners." La. R.S. 34:991(B)(1).

C. The Board Certifies Those Petitioners Who Are Qualified As Candidates For River Port Pilot Apprenticeship

The Board (*i.e.*, not the Association) determines which of the petitioners are qualified to become River Port Pilots

---

[5] Once the Association has notified the Board that its members have determined there is a need for additional pilots, the Association has no duties or obligations with respect thereto until the Board presents it with a list of qualified candidates for River Port Pilot apprentice. Even at that point, the River Port Pilots individually vote for River Port Pilot apprentices.

in accordance with the rules promulgated by the Board. The Board then provides the Association with a list of those petitioners whom the Board certified as being qualified to become River Port Pilots. Those individuals are known as "candidates." La. R.S. 34:991 and 993. The Association is not charged by law to determine, and has no duty, obligation, or power to determine, whether a petitioner is qualified under the rules of the Board to be a candidate for River Port Pilot apprentice.

D. The River Port Pilots Select an Appropriate Number of Apprentices

The River Port Pilots then select a number of those candidates, by majority vote, commensurate with the number of new pilots needed for entrance into the apprenticeship program. The Board cannot include on the ballot and River Port Pilots cannot select individuals who have not been certified by the Board as qualified candidates; such individuals are ineligible, as a matter of law, for inclusion on the ballot. From the list of petitioners qualified as candidates the River Port Pilots select the needed number of individuals who are then known as "apprentices." Thereafter, each apprentice begins a year-long apprenticeship program.

E. The Board Certifies and Governor Commissions

Only after successfully completing the apprenticeship program is an apprentice then certified by the Board as having completed all statutory requirements; after that he may then be commissioned by the Governor as a River

Port Pilot. The commissioned River Port Pilot may then elect to join the Association. La. R.S. 34:993.

III. Coleman was not qualified to be a candidate for River Port Pilot apprentice under the regulations duly promulgated by the Board

In the spring of 1999, the members of the Association determined, by petition, that there was a need for additional River Port Pilots. Coleman was among numerous individuals who submitted applications to the Board (*i.e.*, not to the Association).

Coleman's application reflected on its face that he was over 40 years of age ***and*** that he did not meet at least two other requirements established by the Board to be certified as a candidate for River Port Pilot. Coleman did not have ***any*** of four required USCG Licenses. Coleman's two felony convictions for "processing and attempting to distribute" marijuana and cocaine, respectively, also run afoul of the requirement that a "petitioner must be of good moral character" and rendered him unqualified under the rules of the Board.

1. Coleman has two prior felony convictions

Under the Board's Rules, a petitioner must be of "good moral character" in order to be qualified. The Board's rules specifically state that "evidence of a clear police record will be considered, but the Board reserves the right to examine other sources of information as to the applicant's character." This implies that a clear police record alone does not satisfy the requirement of "good moral character." Not only does Coleman not have a clear police record, he actually

has two felony convictions for possession with intent to distribute narcotics.

Coleman stated on his application to the Board that: "in 1985, while in the process of losing my business, I made an unfortunate decision to save it through unlawful means. I was convicted of processing and attempting to distribute controlled substances." In fact, Coleman was convicted in federal court for the Eastern District of Louisiana in 1985 of possession with intent to distribute cocaine, and in the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana, in 1986, of possession with intent to distribute marijuana.

The Board members have sworn that the Board has never certified a "petitioner" with a history of felony convictions as a qualified "candidate" for River Port Pilot; and that they consider such to be evidence of poor moral character. As per the testimony of one of the Board members who refused to certify Coleman as a qualified candidate, River Port Pilots are one of the first persons to board foreign ships coming into United States' ports, and the Board is very concerned about people with a history of involvement in the drug trade establishing relationships with foreign seamen entering the port of New Orleans.

2. Coleman lacked the appropriate qualifying USCG Licenses

Coleman did not hold the *four* required USCG Licenses required by Rule 2.1 of Section 4 of the rules promulgated by the Board. Section IV, Rule 2 of the rules promulgated by the Board provides that before a petitioner can be accepted as a candidate for the River Port Pilot apprentice program, he must hold a USCG License of

steam or motor vessel of any gross tons for four specifically defined waterways. Coleman admits that he did not hold any of these licenses when he submitted his application (petition) to the Board nor does he hold any of them now.

3. There was no duty on the part of defendants to assist Coleman in obtaining the USCG Licenses he needs in order to be qualified as a candidate for River Port Pilot Apprentice

Coleman's attempt to overcome his lack of licensure qualifications by asserting that his lack of qualification was itself somehow the result of the age discrimination of which he complains, fails for at least two reasons. First, there is no duty, under the ADEA or otherwise, on the part of the Association and/or its membership to assist individuals in obtaining the USCG Licenses. Second, Coleman could have obtained the service time required by the USCG, as well as the USCG Licenses themselves, without any help from the Association and/or its members.

Coleman admits that the evidence establishes that the USCG does ***not*** require that the service time in the wheelhouse of an appropriately sized vessel (which the USCG requires as a prerequisite to sit for the examination for a first class pilot license), be acquired in the presence of a commissioned pilot. Additionally, the record established that at least two pilots obtained most or all of the service time they needed to obtain the USCG Licenses without assistance from commissioned River Port Pilots, having obtained their service time in the course of their employment with a towing company as tug boat captains. Even the Association's expert witness explained that the USCG does not require the service time to be in the presence of a

commissioned pilot, but rather accepts service time obtained through employment with various tug boat companies, through permission from ships' agents or numerous other entities. This expert further explained that he obtained his service time while employed by various towing companies and that he did not obtain any service time while riding as an observer with a commissioned River Port Pilot.

4. As he was not qualified, the River Port Pilots could not select Coleman as an apprentice

Because of Coleman's felony convictions/questionable moral character and because he did not hold the appropriate USCG Licenses, the Board could not have certified him as a candidate for River Port Pilot, regardless of his age, without violating the law and/or its own rules. Therefore, the Board (as opposed to the Association) did not certify him as being qualified to be a River Port Pilot. It is undisputed that Coleman never got to the third step of the multi-step process outlined in the previous section. Although he was a petitioner, Coleman was never certified by the Board as a candidate for the River Port Pilot apprentice program.

Once the Association received the list of candidates from the Board (*i.e.*, those who were certified by the Board as qualified to become River Port Pilots) the River Port Pilots select individuals to enter the apprentice program. Coleman was never on that list because he was never certified as a candidate by the Board. So, he could not be selected by the River Port Pilots to be among the apprentices to enter the apprentice program.

SUMMARY OF ARGUMENT

The Association respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Fifth Circuit's decision affirming the district court's grant of summary judgment. The decision is proper on three separate grounds:

First, the ADEA, which is the sole basis for the petitioner's claims in this matter, is not applicable to his relationship with the Association because River Port Pilots are not employees of the Association, but rather are independent contractors hired on a voyage-by-voyage basis by the owners of the ships which they pilot. Thus, petitioner was not a prospective employee of the Association. It is well settled that the ADEA only applies to employee/employer relationships. This was the ground upon which summary judgment was both granted and affirmed.

Second, even if it is applicable, petitioner has not adduced sufficient evidence to constitute a *prima facie* case of discrimination under the ADEA because he was not qualified for the position sought (*i.e.*, River Port Pilot apprentice) under the rules duly promulgated by the Board. He was disqualified because he did not hold the proper USCG Licenses and he had two prior felony convictions for possession with intent to distribute narcotics.

Finally, by law, apprentices can only be selected from a list of qualified candidates as determined by the Board. Thus, it is impossible for the Association to have discriminated against petitioner (*i.e.*, there was no discrimination in fact under the ADEA) because it is undisputed that he was not certified as a qualified candidate for River Port Pilot apprentice by the Board. Thus, he could not be selected because the Board did not put his name on the ballot!

The district court was correct in granting and the Fifth Circuit in affirming summary judgment in favor of the Association and the Board because reasonable persons could not conclude, based on the record evidence, that River Port Pilots are employees of the Association and/or Board; that petitioner made out a *prima facie* case of discrimination under the ADEA; or that there was any discrimination in fact by the Association against petitioner.

REASONS FOR DENYING THE WRIT

The petition does not warrant review by this Court. The decisions below were based upon the particular facts and circumstances concerning River Port Pilots which rendered petitioner without an ADEA claim. Moreover, significant grounds independent from those set forth in the petition exist for the basis of the decision below. Respondent urges this Court not to waste its resources on a case that does not present any compelling reasons for review. Further, granting the petition will have no impact on litigants in general and will not clarify the law.

I. The ADEA (which is the sole basis for Coleman's claims) is inapplicable because Commissioned River Port Pilots are not employees of the Association or the Board; rather, they are independent contractors

Coleman's claims in this matter are premised solely on the ADEA. It is well settled that the ADEA applies only in the context of an employee/employer relationship, and does not apply where the plaintiff is an independent contractor. *Fields v. Hallsville Indep. School Dist.*, 906 F.2d 1017 (5th

Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Hickey v. Arkla Industries, Inc.*, 699 F.2d 748 (5th Cir. 1983); *Ehret v. State of Louisiana*, 862 F. Supp. 1546 (E.D. La. 1992).

Coleman can only succeed if the Association is an "employer," "employment agency," or "labor organization" within the meaning of the ADEA which provides in pertinent part:

> (a)(1) It shall be unlawful for an ***employer*** to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . . . .
>
> (b) It shall be unlawful for any ***employment agency*** to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age. . . .
>
> (c)(1) It shall be unlawful for a ***labor organization*** to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his age. . . .

29 U.S.C. § 623(a)(1); (b); and (c)(1) (emphasis added).

By its plain terms, the ADEA applies *only* to ***employers, employment agencies***, *and* ***labor organizations***. All three such entities are specifically defined at 29 U.S.C. § 630.[6] Classification of a defendant as any of the three

[6] Although these terms are defined in the ADEA, the definitions themselves are of no help in this matter. "Employer" is defined at 29 U.S.C. § 630(b) as "a person engaged in an industry affecting commerce

(Continued on following page)

listed entities is entirely dependent upon the plaintiff being an "employee" within the meaning of the ADEA.

Considering the evidence submitted in this matter and based on its previous rulings on this very same issue, the district court held that there was no genuine issue of material fact with respect to whether the Association or the Board are entities subject to liability under the ADEA; and finding defendants not to be entities subject to the ADEA because they are not "employers" within the meaning of the ADEA, granted their summary judgment motions. Although it applied additional factors in its analysis, the Fifth Circuit affirmed on the same grounds (*i.e.*, the defendants are not "employer").

The lower courts were correct in determining that River Port Pilots are independent contractors, not employees; and, consequently, that neither the Association nor the Board are employers, employment agencies, or labor organizations within the meaning of the ADEA. Although they applied different tests, both the district court and Fifth Circuit considered substantially similar factors in determining that the Association lacked the requisite control over River Port Pilots to make it an "employer" for purposes of the ADEA.[7]

---

who has twenty or more employees. . . ." Likewise the definitions of "employment agency" (§ 630(c)) and "labor organization" (§ 630(d)) include the terms "employees" and "employers" without further explanation. The term "employee" is defined in the ADEA as "an individual employed by an employer. . . ." 29 U.S.C. § 630(f).

[7] Coleman also argues at page 13 of his Petition that airline pilots, engineers, trial attorneys, and ship captains, sometimes work as employees. This is a specious and irrelevant analogy. The employee/independent contractor issue in this matter cannot be decided on the basis of the type of relationship which may or may not exist between others, or even upon what is the most prevalent type of

(Continued on following page)

A. The district court's test: *Ehret*

The district court held that the appropriate test for determining whether River Port Pilots are employees or independent contractors was set forth in *Ehret,* as follows:

> It is undisputed that neither the Board nor the Association actually hires river port pilots. Thus, in determining whether these entities are "employers," the Court must apply a "hybrid test" which considers the "economic realities" of the work relationship as an important factor in the calculus, but which focuses more on the employer's control over the worker's performance.
>
> . . . .
>
> [T]he "right to control" is the most important factor in determining employee status.

Ehret, 862 F. Supp. at 1549 (citations omitted).[8]

The plaintiff in *Ehret* made the same allegation against the Association as made by Coleman.[9] The Association's relationship with River Port Pilots has not changed

---

relationship that exists in a particular industry. Rather, the issue in this matter depends solely on the facts and circumstances of the particular relationship existing between River Port Pilots and the Association and/or Board. Based on that relationship, River Port Pilots are independent contractors. The evidence is clear that neither the Association nor the Board exercises operational control over the work product (*i.e.*, the navigational advice) of River Port Pilots.

[8] *Ehret* also set forth eleven other relevant factors in determining employment status. *See also McKeithen v. The SS Frosta*, 441 F. Supp. 1213 (E.D. La. 1977); *Fields*, 906 F.2d at 1019-20.

[9] The plaintiff in *Ehret* was similarly situated to Coleman, with the exception that the plaintiff in *Ehret* was otherwise qualified (*i.e.*, had all required USCG Licenses and was of good moral character), whereas Coleman is not.

since the *Ehret* case was decided. Then, as now, the Association has no right to exercise operational control over its members in the performance of their duties. In holding that the Association was not the employer of River Port Pilots, and that River Port Pilots were "independent contractors" and not "employees," the *Ehret* court recognized that the Association does not exercise operational control over the services provided by pilots to the vessels they pilot. *Ehret,* 862 F. Supp. at 1550.

The *Ehret* court also cited the following factors as standing for the proposition that the Association is not the "employer" of River Port Pilots and/or that River Port Pilots are not "employees": "(1) The Association does not hire or fire pilots, (2) Pilots are specialists with a high degree of skill, (3) The Association deducts no withholding tax or Social Security from amounts paid to the pilots, and (4) The pilots accrue no annual leave time." *Id.*

The *Ehret* court noted that the only factor which militated in favor of an employee/employer relationship was the fact that the Association administers a retirement plan for its members. *Id.* However, the *Ehret* court held that single factor to be "insufficient to make the Association an employer of pilots for the purposes of the ADEA. Thus, the Court finds that the pilots operate as independent contractors, and the Association is not an employer under the ADEA." *Id.*; *see also Blancq v. Hapag-Lloyd A.G.*, 986 F. Supp. 376, 381 n.6 & 382 (E.D. La. 1997) (collecting cases); *Barrow v. New Orleans Steamship Ass'n*, 10 F.3d 292 (5th Cir. 1994).

In a recent case involving whether a principal exercised operational control over its contractor, so as to subject the principal to vicarious liability for the contractor's actions, the Fifth Circuit held that "operational control exists only if

the principal has direct supervision over the step-by-step process of accomplishing the work such that the contractor is not entirely free to do the work in his own way." *Fruge v. Parker Drilling Co.*, 337 F.3d 558, 564 (5th Cir. 2003), *cert. denied*, 540 U.S. 1161 (2004). The navigational advice given by a River Port Pilot to the master of the vessel he is piloting is completely and entirely within the discretion of the River Port Pilot, and neither the Association nor the master of the vessel being piloted exercises supervision or control over the River Port Pilot's advice. River Port Pilots are highly skilled professionals whose duties are to navigate large ocean going ships in a swiftly flowing river, with treacherous currents, eddies, sharp bends and ever evolving sandbars and shoals. The River Port Pilot charged with piloting the ship must take into account innumerable and ever changing circumstances in formulating the navigational advice which is his work product. The weather, the tides, the river's current, other vessels, the speed, size, power and capabilities of the vessel being piloted, and many other factors must all be taken into consideration by the River Port Pilot when formulating his navigational advice. This of necessity requires great skill and autonomous, split second decision making.

The River Port Pilot, however, does not actually take physical control of the ship (*i.e.*, he does not physically take the helm). Rather, the River Port Pilot gives ***navigational advice*** to the master of the vessel, who remains at all times, in control of the ship. Although the master of the vessel is free to disregard the River Port Pilot's advice, he has no control over, or input into, the navigational advice given by the River Port Pilot. Regardless, it would be totally impractical, and probably dangerous, for any one other than the River Port Pilot to exercise operational control of the work

product of the River Port Pilot (*i.e.*, his navigational advice). The Association does not exercise any operational control over the navigational advice given by the River Port Pilots to the master of the vessel being piloted.

The *Ehret* court's characterization of River Port Pilots as "independent contractors" and not "employees" was correct then, and is still correct now. Neither the Association nor the shipowners/masters of the vessels being piloted deduct or withhold taxes or FICA fees from the monies paid to River Port Pilots. Neither the Association nor the owners/masters of vessels can dictate when a River Port Pilot must work. River Port Pilots accrue no "vacation" time, and can work as often or as little as desired.

Finally, were the Association the "employer" of River Port Pilots, it would be subject to liability for the actions of River Port Pilots pursuant to the concept of *respondeat superior*. However, in the case of River Port Pilots, it is well settled that the Association is ***not*** vicariously liable for the actions of its members. *McKeithen*, 441 F. Supp. at 1220 (citing *Guy v. Donald*, 203 U.S. 399 (1906); *Dampskibsselskabet Atlanta A/S v. The United States*, 31 F.2d 961 (5th Cir. 1929)). Louisiana law also specifically provides that a pilot is himself personally responsible for any damages caused by his or her negligence. *See* La. R.S. 34:1001(D); *Koepp v. Sea-land Service, Inc.*, 645 So.2d 1269 (La. App. 4 Cir. 1994). Further, the Association's Charter specifically states that the Association is not responsible for the debts or faults of its members.

B. The Fifth Circuit's test: *Clackamas*

The Fifth Circuit also considered paramount the matter of control. It, however, applied the control standard

approved by this Court in *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440 (2003), which had been adopted by the EEOC in questioning whether a partner, officer, major shareholder or director qualifies as an employee. The Fifth Circuit found that analysis appropriate given the relationship between River Port Pilots and the Association. Nevertheless, the issue remained "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control." *Id.* at 448. In making that determination, the factors to be considered are:

1. Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.

2. Whether, and if so, to what extent the organization supervises the individual's work.

3. Whether the individual reports to someone high in the organization.

4. Whether, and if so, to what extent the individual is able to influence the organization.

5. Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.

6. Whether the individual shares in the profits, losses, and liabilities or the organization.

Id. at 449-50. In analyzing those factors with respect to the Association, the Fifth Circuit held that each factor weighed against labeling River Port Pilots as employees for purposes of the ADEA.

In analyzing the first factor, the ability to hire and fire, the Fifth Circuit recognized that the Association did

not do so. Instead, the Fifth Circuit held that although the Association's members (*i.e.*, the River Port Pilots) elected apprentices, neither the Association nor its members have the power to grant the state commission necessary to be a River Port Pilot as that power resides with the Governor and that neither the Association nor its members have the power to decommission a River Port Pilot. Further, insofar as regulating the actual job performance of a River Port Pilot, the role of piloting belongs solely to the River Port Pilot and not the Association whose responsibility is essentially to dispatch a River Port Pilot to a ship needing one which, in turn, directly engages the River Port Pilot and to collect and disburse pilotage fees. Thus, this factor "weigh[s] against labeling the pilots ADEA employees."[10]

The Fifth Circuit held with respect to the second and third factors that the Association did not supervise an individual River Port Pilots' work (*i.e.*, piloting a vessel) and that no River Port Pilot reported to someone higher in the Association. The Fifth Circuit recognized that no chain of command existed in the Association concerning the performance of piloting a vessel as each individual River Port Pilot offered his own independent professional judgment in the course of navigation.[11]

As the River Port Pilots constitute the entire membership of the Association with each one holding an equal share and participation in election of its board of directors, etc., the Fifth Circuit held with respect to the fourth factor that each River Port Pilot exerted substantial influence over the Association's management as well as its rules and

---

[10] 437 F.3d at 481.

[11] *Id.*

regulations. Thus, this factor "weighs against labeling the pilots ADEA employees."[12]

The Fifth Circuit held with respect to the fifth factor that the Association's charter clearly and unequivocally provides that no employment relationship exists between the Association and any River Port Pilot. Once again, the Fifth Circuit found "[t]his factor also weighs against labeling the pilots ADEA employees."[13]

The Fifth Circuit held that the River Port Pilots share in the Association's profits/losses according to an agreed upon formula between them (*i.e.*, the River Port Pilots). The Court also held, citing *McKeithen*, 441 F. Supp. at 1220, that each River Port Pilots is liable for his own negligence consistent with the fact that they act independently according to their own professional judgment in piloting a vessel and that the Association is not subject to *respondeat superior* liability. Consequently, the sixth factor "also weighs against labeling the pilots ADEA employees."[14]

In summary, the Fifth Circuit concluded that each factor established a lack of employer-like control over the River Port Pilots: the Association does not hire or fire River Port Pilots nor can it decommission them; it does not supervise the work of the River Port Pilots; its charter does not create an employer-employee relationship; each River Port Pilot performs his job according to his own professional judgment; the River Port Pilots have ultimate

---

[12] *Id.*

[13] *Id.*

[14] *Id.*

control over the Association management, rules and regulations; and each River Port Pilot maintains personal liability for his own negligence without vicarious liability attaching to the Association.[15]

Regardless of what test is applied, the Association lacks the requisite control over the River Port Pilots to make it an "employer" for purposes of the ADEA.[16]

II. 29 C.F.R. § 1625.21 does not expand the scope of the ADEA beyond the context of an employee/ employer relationship

Coleman argues that certain changes in the Code of Federal Regulations (CFR), which make the ADEA applicable to apprenticeship programs, somehow overrules the holding in the *Ehret* case, and/or brings the Association within the ambit of the ADEA. However, the CFR regulation cited by Coleman merely expanded the activities prohibited by the ADEA to include age discrimination in apprenticeship programs.

29 CFR § 1625.21 provided at the time *Ehret* was decided, and still provides today, that "the terms *person, employer, employment agency, labor organization,* and *employee* shall have the meanings set forth in § 11 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et seq.*, hereafter referred to as the Act." The enactment of 29 CFR § 1625.21, which brought "all apprenticeship programs" within the ambit of

---

[15] *Id.* at 481-82

[16] Even the focus of *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992), relied upon by Coleman, is "right of control" and, in this case, it simply does not exist.

the ADEA, did not alter the definitions of "employer," etc., found in the ADEA, nor did it alter § 1625.21.

Consequently, the inclusion of a prohibition against discrimination in apprenticeship programs within the implementing regulations of the ADEA merely added additional activities which those entities already subject to the ADEA are prohibited from engaging in. The new regulation did not expand the universe of entities to which the ADEA applies in the first place. *See Coleman v. New Orleans Baton Rouge Steamship Pilots Ass'n,* 2004 WL 1237447 (E.D. La. 2004). The ADEA, at the time of *Ehret* and now, applies only to employers, employment agencies, and labor organizations. *See* 29 U.S.C. § 623(a)(1); (b) and (c)(1). The CFR regulation cited by Coleman does not change that.

The Second Circuit case[17] cited by Coleman does not stand for the proposition that the ADEA applies in the context of a principal/independent contractor relationship. In that case it was ***assumed*** that the plaintiff was an ***employee*** and that Title VII applied. There was no discussion, much less a holding, in the case that Title VII (or the ADEA) applied outside of the context of an employee/employer relationship.

Accordingly, as held by the lower courts in this matter and in *Ehret*, River Port Pilots are not "employees" within the meaning of the ADEA. Consequently, the ADEA does not apply to Coleman's claims in this matter.

---

[17] *E.E.O.C. v. Joint Apprenticeship Committee of Joint Industry Bd.*, 186 F.3d 110 (2nd Cir. 1990).

III. The Work Rules were properly not considered; regardless, they are irrelevant

Coleman argues that the Association's Work Rules evidence the Association's control over its members so as to make it the employer of its members. Not only are Coleman's arguments incorrect, but, he did not timely submit the Work Rules as evidence opposing summary judgment.[18]

One of the primary purposes of the Association is the scheduling and dispatching of its members to ships in need of pilotage services. In furtherance of that purpose, the Association has adopted detailed Work Rules relative to the scheduling and assignment of its members to vessels in need of pilotage services. The Work Rules are rules which the Association's members have imposed upon themselves to insure an equitable and fair distribution of work and pilotage fees among the Association members.

The Association member's share of net pilotage fees is not based on the number of ships piloted, but rather on the number of days on duty. The Work Rules are necessary to insure that the pilotage work load is fairly and equitably distributed among the Association's members. Two pilots who are both "on duty" the same number of days in any given month receive the same share of net monthly pilotage fees irrespective of how many vessels each man has piloted during that month. Thus, the detailed Work Rules insure that each Association member does his fair share of

---

[18] Although formally produced to Coleman over 6 months prior to the filing of summary judgment, the Work Rules were not included in the evidence he submitted to the district court. Thus, the Work Rules were properly not considered by the lower courts.

the work while on duty (*i.e.*, pilots his fair share of vessels during the duty period). These are quite literally rules imposed upon the Association members by themselves to set out the order and/or rotation by which pilots on duty are called to perform pilotage services. River Port Pilots can work as much or as little as they like by volunteering for extra duty (for extra pay) in the place of pilots taking time off, or can take as much time off (without pay) as they like. Member pilots can be fined for violations of the Work Rules, for other misconduct, and for failing to report accidents to the Board. However, the Work Rules ***do not*** affect the navigational advice given by a River Port Pilot to the master of the vessel he is piloting.

Neither the Work Rules nor the Association as an entity, control the operational details of the pilot's work (*i.e.*, the navigational advice which the pilot provides to the ship under pilotage). Therefore, Coleman's argument that the Work Rules are evidence of control exercised by the Association over its members is erroneous. The Work Rules do not dictate what navigational advice a pilot provides to a ship under pilotage, and therefore do not constitute the type of operational control which is the hallmark of an employee/employer relationship. *See McKeithen*, 441 F. Supp. at 1220; *Ehret*, 862 F. Supp. at 1549-50.

CONCLUSION

Contrary to the unsupported and incorrect factual allegations and specious analogies contained in Coleman's Petition, the Association does not exercise operational control over the work of River Port Pilots. It does not hire or fire River Port Pilots and it has no discretionary right to

expel a member River Port Pilot, although the Association's Charter establishes that if a member/shareholder loses his USCG Licenses or fails to pay fines exceeding a particular amount, he by agreement relinquishes his membership share of stock. Moreover, absent decommissioning by the Governor, a River Port Pilot can continue to work as a commissioned River Port Pilot on the Crescent stretch of the Mississippi River and not be a member of the Association. The Association does not deduct or withhold taxes from the pilotage fees it collects on behalf of its members, it does not provide annual sick or vacation leave, health insurance or any other such benefits to its members. Simply put, none of the factors of any potentially applicable test militate in favor of employee status for River Port Pilots. Therefore, River Port Pilots are not employees of the Association; and the ADEA is not applicable.

Accordingly, for all the foregoing reasons, the Association respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

PETER J. BUTLER, JR.
RICHARD G. PASSLER
BREAZEALE, SACHSE &
WILSON, L.L.P.
909 Poydras Street, Suite 1500
New Orleans, Louisiana 70112
(504) 584-5454

Attorneys for Respondent,
Crescent River Port Pilots'
Association

APPENDIX

Louisiana Revised Statutes
Title 34. Navigation and Shipping
Chapter 6. Pilots
Part I. Port of New Orleans
Subpart B. River Port Pilots

§ 991. Board of River Port Pilot Commissioners; duties, appointment, qualification, and removal of members

A. There is hereby created the Board of River Port Pilot Commissioners for the Port of New Orleans. The board shall consist of three citizens appointed by the governor, with the consent of the Senate, who presently hold a commission as a river port pilot and such commission has been active for a period of not less than four years. The governor, in appointing the said commissioners, shall designate the president of the board. The commissioners shall serve at the pleasure of the governor. The said commissioners shall take an oath to faithfully perform their duties.

B. The Board of River Port Pilot Commissioners for the Port of Orleans shall:

(1) Formulate rules and regulations pursuant to the Administrative Procedure Act establishing qualifications of river port pilots and providing for the examination and approval of apprenticeship programs for the river port pilots, and to administer the evaluation and examination of river port pilots.

(2) Meet at least quarterly and at all such times as the president of the commission deems necessary.

(3) Formulate rules and regulations pursuant to the Administrative Procedure Act establishing minimum standards of conduct for river port pilots to

include neglect of duty, drunkenness, carelessness, habitual intemperance, substance abuse, and incompetency, and make other rules and regulations for the proper and safe pilotage upon the waters covered by this Subpart and for the efficient administration of this Subpart.

(4) Conduct hearings pursuant to the Administrative Procedure Act, including the right to subpoena documents and witnesses pursuant to R.S. 49:956, and investigate the violation of any provisions of this Subpart or rules or regulations adopted by the commissioners, and to report all findings and conclusions to the governor, should the board request action by the governor.

(5) Have the authority to impose a fine of not more than five hundred dollars upon any river port pilot, to reprimand or remove from a vessel any river port pilot, or to recommend to the governor that the commission of any river port pilot be suspended or revoked if after a hearing conducted in accordance with the Administrative Procedure Act, a river port pilot is found in violation of any rule or regulation adopted by the Board of River Port Pilot Commissioners. In any event, the Board of River Port Pilot Commissioners shall have the authority also to suspend a river port pilot's commission in accordance with R.S. 49:961(C).

(6) Provide to all river port pilots and river port pilot candidates rules and regulations.

C. For purposes of this Subpart and the Administrative Procedure Act only, the term commission shall be used interchangeably with the term license and shall have the same meaning.

§ 991.1. Repealed by Acts 2004, No. 902, § 2, eff. Jan. 1, 2005

§ 992. River port pilots; duties; appointment

A. There shall be a body of pilots known as the "river port pilots" whose duty it shall be to provide pilotage services within the operating territory described in this Subpart.

B. River port pilots shall be duly appointed and commissioned by the governor and shall serve as provided by law or until revocation of the appointment or commission by the governor in accordance with this Subpart.

§ 993. Examinations for appointment; qualifications

Whenever there exists a necessity for more pilots as determined by the river port pilots, the Board of River Port Pilot Commissioners shall hold examinations under such rules and regulations and such requirements as they shall have provided, with the governor's approval; however, no applicant shall be considered by the board unless he submits proper evidence of moral character and is a voter of this state, and shall have completed an approved apprenticeship program within the geographic area affected by this Subpart. The Board of River Port Pilot Commissioners shall issue a certificate to the governor that the applicant has satisfied the requirements of this Subpart. The governor may then, in his discretion, appoint said applicant to existing vacancies.

§ 994. Oath; bond

Each river port pilot shall take an oath of office and furnish bond to the extent of one thousand dollars.

§ 995. Association of river port pilots

The said river port pilots may form themselves into an association as to them may seem fit, not in conflict with law, or with the rules and regulations of the river port pilot commissioners, but nothing herein shall affect any association presently existing.

§ 996. Operating territory

A. The river port pilots shall have the exclusive right to pilot vessels on the Mississippi River between New Orleans, Louisiana and Pilottown, Louisiana and within the Port of New Orleans between Southport and Merauxville; within the Industrial Canal, between the Mississippi River to and including Lake Pontchartrain; within the Intracoastal Canal, between the Industrial Canal and the turning basin at Michoud, inclusive; also for the Mississippi River Gulf Outlet between the Industrial Canal and Mile 28.3, the Gulf Intracoastal Waterway from the Louisiana-Mississippi state line to the Mississippi River Gulf Outlet, including Michoud Slip and Michoud Canal, Chef Pass, Algiers Cutoff, and the Harvey Canal; the Venice Jump within six and one-half miles of the Mississippi River; Bayou Sauvage; and Bayou Liberty.

B. However, nothing herein contained shall prevent an exchange of river port pilots at what is known as "Quarantine Anchorage" or "The Point" or "General Anchorage" between the river port pilots herein named and the pilots engaged in the piloting of vessels above

Southport, nor shall anything herein provided prevent pilots engaging in piloting vessels above Southport from ending or beginning the pilotage from any wharf or "The Point" or "General Anchorage" in the Harbor of New Orleans.

§ 997. Pilotage fees; vessel subject to pilotage

A. The river port pilots shall be entitled to ask for and to receive a fee for their pilotage services.

B. The fees for pilotage services shall be established in accordance with R.S. 34:1121, et seq.

C. The river port pilots shall also be entitled to enter into agreements with the masters, owners, or their agents, of ships and vessels, not otherwise subject to compulsory pilotage as provided by these statutes, for special services, boats, equipment, transportation, and other necessary fees at such rates and for such sums as may be agreed between them, but not to exceed those rates established in accordance with R.S. 34:1121, et seq.

D. All vessels shall employ a river port pilot when navigating the operating territory described in this Subpart except those vessels exempted by the laws of the United States or vessels of one hundred gross tons or less.

E. In case of refusal to take such river port pilot, the master, owner, agent, or consignee of any vessel required to employ a river port pilot shall pay the established pilot fee as if a river port pilot had been employed.

§ 998, 999. Repealed by Acts 1986, No. 960, § 2

§ 1000. Privilege for charges and attorney's fees

The river port pilots shall have a lien and privilege upon any vessel employing a river port pilot for the nonpayment of pilotage fees and charges and for all reasonable attorney fees incurred in connection with the recovery of pilotage fees and charges and enforcement of lien. The lien and privilege may be enforced in any court of competent jurisdiction.

§ 1001. Repealed by Acts 2004, No. 902, § 2, eff. Jan. 1, 2005

§ 1002. Violations and penalties

Anyone attempting to exercise the functions herein vested in the said river port pilots, who has not been commissioned by the governor, shall be fined not less than one thousand five hundred dollars, nor more than five thousand dollars, or imprisoned not less than thirty days, nor more than four months, or both, at the discretion of the court in whose jurisdiction the offense is committed.

§ 1002.1. Employing pilot without a state commission; penalties

A. No master, owner, or agent of a vessel required under this Subpart to take a state commissioned river port pilot shall perform the duties of a river port pilot nor employ a person who is not a state commissioned river port pilot.

B. Whoever violates this Section shall be fined not less than one thousand five hundred dollars nor more

than five thousand dollars, or imprisoned for not more than six months, or both.

§ 1003, 1004. Repealed by Acts 1986, No. 960, § 2

§ 1005. Privilege; communications between river port pilot and Board of River Port Pilot Commissioners

Unless required by a subpoena issued by a court of competent jurisdiction, all communications by and between the Board of River Port Pilot Commissioners and a river port pilot, including all testimony, statements, drawings, logs, or other information designated confidential by the Board of River Port Pilot Commissioners, obtained by, or provided to, the Board of River Port Pilot Commissioners in connection with or during the course of any investigation or hearing shall be privileged and such circumstances, testimony, statements, drawings, logs, or other information designated confidential shall not be required to be disclosed in any original proceedings save the appeal process in accordance with the Administrative Procedure Act and pursuant to reporting requirement to the governor.

§ 1006. Blank

§ 1007. Repealed by Acts 1968, No. 579, § 8

§ 1008. Repealed by Acts 1986, No. 960, § 2

§ 1009. Employing pilot without a commission; liability of vessel, master, and owner

A vessel which is required to use a river port pilot pursuant to this Subpart and fails to do so when a river port pilot offers his services, the vessel, its captain, and owners

shall be liable for a civil penalty and shall forfeit to the state of Louisiana the sum of fifteen thousand dollars, with privilege on the vessel, to be recovered before any court of competent jurisdiction. An action for forfeiture under this Section may be brought by the attorney general of the state of Louisiana or by the Board of River Port Pilot Commissioners. If a judgment is obtained hereunder, the court shall include in its judgment an award for reasonable attorney fees and costs incurred in connection with the prosecution of such action.

Supreme Court, U.S.
FILED
MAY 23 2006
OFFICE OF THE CLERK

No. 05-1347

In The
Supreme Court of the United States

TERRY C. COLEMAN,

Petitioner,

v.

NEW ORLEANS AND BATON ROUGE STEAMSHIP PILOTS' ASSOCIATION, CRESCENT RIVER PORT PILOTS ASSOCIATION, INC., and BOARD OF RIVER PORT PILOT COMMISSIONERS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF NEW ORLEANS & BATON ROUGE STEAMSHIP PILOTS' ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM J. KELLY, III,
Counsel of Record,
La. Bar No. 21662
ADAMS AND REESE LLP
701 Poydras Street,
Suite 4500
New Orleans, LA 70139
Tel: (504) 581-3234

LESLIE A. LANUSSE,
La. Bar. No. 14115
RAYMOND P. WARD,
La. Bar No. 20404
ADAMS AND REESE LLP
701 Poydras Street,
Suite 4500
New Orleans, LA
Tel: (504) 581-3234

E. JOHN LITCHFIELD,
La. Bar No. 8622
BERRIGAN, LITCHFIELD,
SCHONEKAS, MANN, TRAINA
& THOMPSON, LLC
400 Poydras Street,
Suite 2000
New Orleans, LA 70130
Tel: (504) 568-0541

ARTHUR J. LENTINI,
La. Bar No. # 8520
LAW OFFICE OF
ARTHUR J. LENTINI, APLC
6620 Riverside Drive,
Suite 312
Metairie, LA 70003
Tel: (504) 780-8700

Attorneys for New Orleans & Baton Rouge Steamship Pilots' Association, Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The New Orleans & Baton Rouge Steamship Pilots' Association (NOBRA) is a not-for-profit corporation formed "[t]o carry on the business of piloting sea-going and other vessels on the Mississippi River," between the ports of New Orleans and Baton Rouge. It is owned by its member pilots, each of whom holds one share of its stock. Are the pilot-shareholders "employees" of NOBRA for purposes of the Age Discrimination in Employment Act of 1967 (ADEA)?

CORPORATE DISCLOSURE STATEMENT

NOBRA is a pilot association established by a statutory compulsory pilotage system. It is a private, not-for-profit corporation of New Orleans and Baton Rouge pilots, with all its stock owned by its member pilots.

TABLE OF CONTENTS

	Page
Question Presented	i
Corporate Disclosure Statement	ii
Table of Authorities	iv
Statement of the Case	1
A. NOBRA's organization and functioning	1
B. NOBRA's lack of control over its pilots' work	2
C. Becoming a pilot-shareholder of NOBRA	3
D. Terry Coleman and the 2001 election	4
E. Proceedings below	4
Summary of the Argument	5
Argument	6
A. The legal issue decided by the Court of Appeals here – whether a shareholder is an employee of a corporation for purposes of federal anti-discrimination statutes – was decided just three years ago by this Court in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003)	6
B. There is no conflict between the Fifth Circuit's decision here and the Second Circuit's decision in *EEOC v. Joint Apprenticeship Committee*, because the two decisions addressed separate issues	11
Conclusion	12

TABLE OF AUTHORITIES

Page

CASES

Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003) ..... *passim*

Coleman v. Crescent River Port Pilots Assn., 2004 WL 1278005, 2004 U.S. Dist. LEXIS 10588 (E.D. La. June 8, 2004), *reconsideration denied*, 2004 WL 1664017, 2004 U.S. Dist. LEXIS 14225 (July 23, 2004), *aff'd*, 437 F.3d 471 (5th Cir. 2006) 5

Coleman v. New Orleans & Baton Rouge Steamship Pilots' Assn., 437 F.3d 471 (5th Cir. 2006) 5, 9

Coleman v. New Orleans Baton Rouge Steamship Pilots Assn., 2004 WL 1237447, 2004 U.S. Dist. LEXIS 10049 (E.D. La. June 1, 2004), *reconsideration denied*, 2004 WL 1555243, 2004 U.S. Dist. LEXIS 12916 (E.D. La. July 9, 2004), *aff'd*, 437 F.3d 471 (5th Cir. 2006) 5

EEOC v. Joint Apprenticeship Committee, 186 F.3d 110 (2d Cir. 1998) 6, 11

Hyland v. New Haven Radiology Assocs., 794 F.2d 793 (2d Cir. 1986) 10

Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992) 9, 10

NLRB v. United Ins. Co. of America, 390 U.S. 254 (1968) 9

STATUTES

29 U.S.C. § 623 6

29 U.S.C. § 630 ..... 1, 7

42 U.S.C. § 12111 7

TABLE OF AUTHORITIES – Continued

Page

La. Stat. Ann. § 34:1042 3

La. Stat. Ann. § 34:1045 4

REGULATIONS

La. Admin. Code tit. 46, § 6107 3

STATEMENT OF THE CASE

Coleman's Statement of the Case includes many allegations having no bearing on the issue raised in his petition. The issue here is whether NOBRA is an "employer" for purposes of the Age Discrimination in Employment Act of 1967 (ADEA). The ADEA defines "employer" as "a person engaged in an industry affecting commerce who has twenty or more employees. . . ." 29 U.S.C. § 630(b). The administrative staff of NOBRA numbers fewer than 20. Unless the pilot-shareholders are counted as employees, NOBRA does not meet the 20-employee threshold for ADEA application. Determining whether the pilot-shareholders are employees requires focus on NOBRA's legal status as a juridical person, its organization, it functioning, its legal relationship with its pilot-shareholders, and most importantly, its control (or lack thereof) of a pilot's actions in piloting a vessel on the Mississippi River. These crucial facts receive little attention in Coleman's Statement of the Case.

NOBRA believes that the following facts will assist the Court in deciding whether to grant certiorari:

A. NOBRA's organization and functioning.

NOBRA is a pilot association established by a statutory compulsory pilotage system. It is a private, not-for-profit corporation of New Orleans and Baton Rouge pilots, which exists for the purpose of dispatching pilots for foreign-flagged vessels from the port of New Orleans to 31° North Latitude and return, including the port of Baton Rouge and intermediate ports.

NOBRA receives requests for pilotage from ship agents and dispatches available pilots to vessels from a roster. It collects pilots' fees, pays general overhead expenses from the receipts, and remits the net remaining receipts on a monthly basis to the individual member pilots.[1] NOBRA does not accrue profits of its own from its pilots' work. NOBRA does not withhold tax or FICA on money distributed to its pilot-shareholders. At the end of the year, each pilot-shareholder receives from NOBRA an IRS Form 1099 (for non-employee compensation), not a W-2.

NOBRA is organized on a capital-stock basis; each incoming member purchases one share of NOBRA's stock. Although NOBRA elects pilots into membership, pilots do not become shareholders until they are commissioned by the Governor. NOBRA has no authority to hire or fire a shareholder; the sole authority to commission or decommission a pilot rests with the Governor. When a shareholder dies or resigns from NOBRA, ownership of that shareholder's stock reverts to NOBRA, and NOBRA returns to the former member or his heirs the value of the stock.

B. NOBRA's lack of control over its pilots' work.

River pilots are highly skilled professionals whose duties are to navigate large ocean-going ships in a swiftly flowing river, with treacherous currents, eddies, and sharp bends. These duties require autonomous, split-second

---

[1] Coleman's reference to "an annual salary" on page 4 of his petition is incorrect. The NOBRA pilots' compensation is actually a share of profits (piloting fees less administrative expenses), computed according to the number of days the pilot is available to work.

decision-making. When aboard a vessel, the pilot gives navigational advice to the master of the vessel. Though the master is free to disregard the pilot's advice, the master has no control over the navigational advice given by the pilot. Similarly, NOBRA cannot and does not exercise any influence or control over how a pilot navigates a vessel once aboard.

C. Becoming a pilot-shareholder of NOBRA.

The gatekeeper for NOBRA membership is the Board of Examiners, a state regulatory agency and a legal entity separate from NOBRA. It is composed of three individuals appointed by the Governor, with advice and consent of the Louisiana Senate. La. Stat. Ann. § 34:1042. The Board of Examiners reviews the applications of all applicants for election into NOBRA to ensure that they meet the legal requirements. Louisiana law requires that the applicant "shall not have reached his or her forty-fifth birthday before being commissioned." La. Admin. Code tit. 46, § 6107.

After determining which applicants meet the legal requirements, the Board of Examiners forwards to NOBRA the names of the qualified candidates. NOBRA then places those names on a ballot for election.

NOBRA conducts its election by a majority vote of its shareholders. Once elected, the candidate must then go through a pilot apprentice program administered by the Board of Examiners. NOBRA does not operate the apprentice program. It does not, and by law cannot, select the timing, manner, course of work, grading process, examinations, or any other aspect of the apprentice program operated by the Board of Examiners.

Apprentices receive no pay while in the apprentice program. During their apprenticeship, they are not shareholders of NOBRA.

When an apprentice has successfully completed the program, the apprentice's name is submitted by the Board of Examiners to the Governor. Louisiana law vests the Governor with the discretion to commission a candidate. La. Stat. Ann. § 34:1045. If commissioned by the Governor, the former apprentice receives a certificate as a New Orleans Baton Rouge Steamship Pilot. Only then can the former apprentice, now a pilot, became a shareholder of NOBRA.

D. Terry C. Coleman and the 2001 election.

Terry C. Coleman was born on October 6, 1951. In August 1996, he submitted to the Board of Examiners an application to become a state-commissioned pilot. He testified that, within a week or two of the April 2001 election, he "resubmitted" his application. The Board did not approve Coleman's application and did not submit his name to NOBRA as a qualified candidate.

After the Board of Examiners submitted the names of qualified candidates, NOBRA conducted its election. Since the Board of Examiners never certified Coleman as a candidate, NOBRA had no legal authority to include him on the ballot. (The Board of Examiners is not a defendant in this case; Coleman is pursuing separate litigation against the Board in state court.)

E. Proceedings below.

Compared to the intricacies of the system governing piloting in Louisiana, the procedural history here is fairly

simple. Coleman brought an ADEA action against NOBRA. He also brought a separate ADEA against another pilots' association, Crescent River Port Pilots Association, Inc., and the Board of River Port Pilot Commissioners. In due course, NOBRA moved for summary judgment, contending that it is not an "employer" for ADEA purposes. The defendants in the *Crescent* action brought a similar motion. The district court granted summary judgment dismissing Coleman's claims and denied Coleman's motion for reconsideration or new trial.[2] The Court of Appeals affirmed.[3]

SUMMARY OF THE ARGUMENT

The petition for writ of certiorari does not present any of the reasons for granting a writ identified in Rule 10 of this Court's rules.

The issue of federal law addressed by the Court of Appeals here is the same as that addressed by this Court just three years ago in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003): Under what circumstances will a shareholder of a corporation be considered the corporation's "employee" for purposes of

[2] *Coleman v. New Orleans Baton Rouge Steamship Pilots Assn.*, 2004 WL 1237447, 2004 U.S. Dist. LEXIS 10049 (E.D. La. June 1, 2004), *reconsideration denied*, 2004 WL 1555243, 2004 U.S. Dist. LEXIS 12916 (E.D. La. July 9, 2004); *Coleman v. Crescent River Port Pilots Assn.*, 2004 WL 1278005, 2004 U.S. Dist. LEXIS 10588 (E.D. La. June 8, 2004), *reconsideration denied*, 2004 WL 1664017, 2004 U.S. Dist. LEXIS 14225 (July 23, 2004).

[3] *Coleman v. New Orleans & Baton Rouge Steamship Pilots' Assn.*, 437 F.3d 471 (5th Cir. 2006).

federal anti-discrimination statutes? To answer this question, the Court of Appeals turned to the common law as enunciated in *Clackamas* and concluded that the pilot-shareholders of NOBRA are not NOBRA's employees. Coleman complains that the Court of Appeals "focused incorrectly on the *Clackamas* standard,"[4] but fails to support this conclusory statement with any legal argument.

Contrary to the suggestion on pages 10-11 of the Petition, the Court of Appeal's decision here does not conflict with that of the Second Circuit in *EEOC v. Joint Apprenticeship Committee*, 186 F.3d 110 (2d Cir. 1998). In that case, the Second Circuit neither addressed nor decided the crucial issue here: whether the defendant was an "employer" for purposes of federal anti-discrimination statutes. That decision cannot possibly conflict with the Court of Appeals' decision here, because the two decisions resolved completely different issues.

ARGUMENT

A. The legal issue decided by the Court of Appeals here – whether a shareholder is an employee of a corporation for purposes of federal anti-discrimination statutes – was decided just three years ago by this Court in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003).

The ADEA forbids employers from certain forms of discrimination based on age. 29 U.S.C. § 623(a). It defines

[4] Pet. at 11.

employee as "an individual employed by any employer," *id.* § 630(f), and defines *employer* as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . . " *Id.* § 630(b).

Because NOBRA's administrative staff numbers fewer than 20, NOBRA cannot an employer for ADEA purposes unless its pilot-shareholders are considered employees. NOBRA moved for summary judgment based on the argument that the pilot-shareholders are not employees. The district court and Court of Appeals agreed with NOBRA, concluding that as a matter of law, the pilot-shareholders are not employees of NOBRA for ADEA purposes. Thus, the question of whether the ADEA applies to NOBRA turns on another question: whether NOBRA's pilot-shareholders are NOBRA's employees.

Three years ago, in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003), this Court considered a similar question: whether the shareholder physicians of a professional medical corporation should be considered "employees" for purposes of the Americans with Disabilities Act of 1990 (ADA).

The ADA definitions of *employer* and *employee* analyzed in *Clackamas* are, in all material respects, identical to the ADEA definitions of these terms, except that the threshold number of employees in the definition of *employer* is 15 instead of 20. *See* 42 U.S.C. § 12111(4) and (5)(A). Indeed, the *Clackamas* court noted the similarity of the ADA and ADEA definitions. 538 U.S. at 441 n. 1.

In *Clackamas*, this Court found the definitions of *employer* and *employee* "completely circular," because each

is defined in terms of the other. 538 U.S. at 444. Ultimately, this Court concluded that, when Congress does not "helpfully define" terms like *employer* and *employee*, *id.*, then Congress intended that the courts look to the common-law understandings of these terms. *Id.* at 445. This Court concluded that "the common-law element of control is the principle guidepost that should be followed" to determine whether a shareholder is an employee. *Id.* at 448.

For further guidance, this Court in *Clackamas* looked to EEOC guidelines discussing "both the broad question of who is an 'employee' and the narrower question of when partners, officers, members of boards of directors, and major shareholders qualify as employees." *Id.* at 448. The EEOC guidelines listed six factors to be considered in deciding whether a shareholder "acts independently and participates in managing the organization, or whether the individual is subject to the organization's control." *Id.* at 449, quoting EEOC Compliance Manual § 605:0009. This Court was "persuaded by the EEOC's focus on the common-law touchstone of control" to adopt the EEOC's six factors "relevant to the inquiry whether a shareholder-director is an employee":

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
- Whether and, if so, to what extent the organization supervises the individual's work;
- Whether the individual reports to someone higher in the organization;
- Whether and, if so, to what extent the individual is able to influence the organization;

- Whether the parties intended that the individual be an employee, as expressed in written agreements or contract; and
- Whether the individual shares in the profits, losses, and liabilities of the organization.

Id. at 449-50, quoting EEOC Compliance Manual § 605:0009. These six factors, the Court recognized, are not necessarily "exhaustive." *Id.* at 450 n. 10. Rather, the answer to whether a shareholder-director is an employee depends on "all of the incidents of the relationship . . . with no one factor being decisive." *Id.* at 451, quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992) and *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968).

Here the Court of Appeals, faced with the question of whether NOBRA's pilot-shareholders are employees, faithfully followed this Court's lead in *Clackamas*. *See* App. 16-20, *Coleman v. New Orleans & Baton Rouge Steamship Pilots' Assn.*, 437 F.3d 471, 480-82. Recognizing that the six factors are not necessarily exhaustive, the court nevertheless found that all six weigh against classifying the pilot-shareholders as employees. App. 20, 437 F.3d at 481. Whatever is said about the Court of Appeals' analysis, it cannot be said that the court misstated the law.

Indeed, Coleman himself does not contend that the Court of Appeals misstated the law. Instead, he suggests that the court's focus on *Clackamas* was incorrect, and that the court should instead have applied *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992). *See* Pet. at 11. But he fails to explain why *Darden* is a more apt precedent than *Clackamas*.

A reading of both decisions reveals that, contrary to Coleman's unsupported assertion, *Clackamas* is the more apt precedent for this case. The issue in *Darden* was whether an insurance salesman was an employee or an independent contractor for ERISA purposes. The issue in *Clackamas* was whether shareholder-director physicians were employees of their medical corporation for employment anti-discrimination purposes. The issue in this case – whether NOBRA's pilot-shareholders are employees – more closely resembles *Clackamas* than *Darden*. Indeed, in *Clackamas* this Court repeatedly suggested that its holding was not confined to the ADA, but would apply to other anti-discrimination statutes, particularly the ADEA:

- Footnote 1 of *Clackamas* points out the similarity between the definitions of *employer* in the ADA and ADEA.
- Footnote 3 of *Clackamas* observes that the "disagreement in the Circuits" resolved in *Clackamas* "is not confined to the particulars of the ADA," citing an ADEA opinion of the Second Circuit, *Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793 (2d Cir. 1986).
- The EEOC Compliance Manual, from which the Court borrowed the six factors discussed above, "states that it applies across the board to other federal antidiscrimination statutes," including the ADEA. 538 U.S. at 449 n. 7.

In short, this case does not involve a legal question that is unsettled. Rather, the question was settled just three years ago in *Clackamas*. This Court's message was clear and was understood and followed by the Court of Appeals.

B. There is no conflict between the Fifth Circuit's decision here and the Second Circuit's decision in *EEOC v. Joint Apprenticeship Committee*, because the two decisions addressed separate issues.

On pages 10-11 of his petition, Coleman suggests that the Court of Appeals' decision here conflicts with that of the Second Circuit in *EEOC v. Joint Apprenticeship Committee*, 186 F.3d 110 (2nd Cir. 1998). But no such conflict exists, because the two decisions address separate issues.

Unlike the Fifth Circuit here, the Second Circuit did not consider whether the defendant, the Joint Apprenticeship Committee (JAC), was an "employer" for purposes of federal anti-discrimination statutes (in that case, Title VII). Rather, it appears that JAC's status as an employer was not contested. The only issues decided by the Second Circuit were the sufficiency of the EEOC's summary-judgment evidence on liability and the district court's refusal (for reasons of untimeliness) to allow the JAC to offer contradictory evidence.[5]

Since the Second Circuit's decision resolved issues completely different from the single issue decided by the Fifth Circuit here, the two decisions cannot possibly conflict.

---

[5] To guide the district court on remand, the Second Circuit also addressed the issue of backpay, which had been raised by the parties on appeal. *See* 186 F.3d at 122-23. That issue, like the others discussed by the Second Circuit, is not addressed in the Fifth Circuit's decision here.

CONCLUSION

The question raised in this case has already been addressed by this Court in *Clackamas*, a three-year-old decision. Coleman has not demonstrated any need for this Court to revisit the question so soon. Indeed, he seeks no change, development, or refinement of the law governing employment discrimination. The only thing he seeks is a second layer of appellate review, to correct what he contends to be a misapplication of settled law to a specific, relatively rare set of facts – state-created institutions governing pilots on the Mississippi River.

NOBRA suggests that this Court deny Coleman's petition.

Respectfully submitted,

WILLIAM J. KELLY III,
Counsel of Record
La. Bar No. 21662
ADAMS AND REESE LLP
701 Poydras Street, Suite 4500
New Orleans, LA 70139
Tel: (504) 581-3234

LESLIE A. LANUSSE,
La. Bar No. 14115
RAYMOND P. WARD,
La. Bar No. 20404
ADAMS AND REESE LLP
701 Poydras Street, Suite 4500
New Orleans, LA 70139
Tel: (504) 581-3234

E. JOHN LITCHFIELD,
La. Bar No. 8622
BERRIGAN, LITCHFIELD, SCHONEKAS,
MANN, TRAINA & THOMPSON, LLC
400 Poydras Street, Suite 2000
New Orleans, LA 70130
Tel: (504) 568-0541

ARTHUR J. LENTINI,
La. Bar No. 8520
LAW OFFICE OF
ARTHUR J. LENTINI, APLC
6620 Riverside Drive, Suite 312
Metairie, LA 70003
Tel: (504) 780-8700

Attorneys for New Orleans & Baton Rouge Steamship Pilots' Association, Respondent